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AMERICA'S
FOREIGN POLICY

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AMERICA'S FOREIGN POLICY

ESSAYS AND
ADDRESSES

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INTRODUCTION

THE essays and addresses gathered in this little volume, with few exceptions, have been called out by public events during the past four years. For the courtesy of a permission to reprint certain of them, I return sincere thanks to the publications where they first appeared. They were adapted for special occasions, or to meet special questions, and differ much in style and form on this account. Nor has pains been taken to remove from them the references to time which they contain. Nevertheless, it is hoped that they have a certain unity and present value in a discussion of the foreign policy of the United States.

For some years our national government has seemed to me to be on the eve of an important change of policy in its aims and ideals. It has shown an ever-growing disposition to break away from our early habit of political isolation, and to assert itself in the rivalries of the world's politics. This change

I have dreaded, and the opposite, the conservative view, animates many of my pages.

How this change was to come, no man could anticipate. That we, as a people, are nearer to its realization to-day than ever before, is a fact which stares us in the face.

One important step in the new program, call it colonialism or imperialism or what you will, has been taken in the annexation of the Hawaiian Islands. And the motive for it largely was their strategical importance and their convenience as a stepping-stone to the Philippines.

The terms of peace to be agreed upon with Spain will go far to decide our future destiny. A wonderful chance of aggrandizement seems to be within our grasp. Shall we seize it? Ought we to resist it? Is it consistent with our true mission, with our highest development?

There are two sets of advocates of this policy of imperialism. One reasons thus: The capture of the Philippines is a divinely ordered responsibility. Whether we wish it or not, the civilization and Christianization of these populous islands have been suddenly laid upon our shoulders. Let us not prove unworthy of the trust. The other sees in the retention of Spain's colonies a chance to provide ourselves with foreign markets, and extend our foreign trade, which may never recur. These views are both weighty, both

sincere, yet both may be mistaken. How can we be sure that this opportunity is a responsibility to be borne, and not a temptation to be resisted? An opportunity is not necessarily a reason. And, again, does the possession of colonies, for a people organized as we are, promise a healthful growth of trade and markets, or such an entanglement with the rivalries, jealousies, and ambitions of other and powerful nations as to injure both?

Already in the manœuvering of the Germans for position at Manila, we may see a sample of the difficulties of the situation. In this connection, let me say very frankly that, if I understand the nature of the American aright, the one thing which he will not put up with is an attempt to limit his prerogatives as conqueror or treaty-maker. Generous and broad-minded he may be in his terms of peace; but to have those terms dictated by a European concert, to be put on the plane of Turkey or of Greece, or even to be curbed in victory like Russia or Japan, is a thing not to be endured. He would fight in preference. And yet it is to just such a necessity that the new policy would expose him. From a single power like Germany he has nothing to fear, because Germany's real influence is continental. It does not touch him nearly. It is not translatable into colonial importance and naval

effectiveness. The mere cost of a contest with the United States would endanger her place in the European equilibrium. But let a European coalition attempt the same thing, and how can one power resist it, unless an ally be called in, and the world be set by the ears?

The old theory of the balance of power confined its working to the European system, to land power, and to political, not commercial, growth. There are signs that every one of these limitations is being overridden. The scramble for land in Africa and in China, the reaching out for new markets, the inclusion of Japan in the world's balance, all show that we cannot be within the sphere of the concert, yet not of it. We have to take the bitter with the sweet, the limitations with the privileges.

Much is said by irresponsible persons of the erection of the United States into a great military power as a result of the Spanish war. But clearly this depends upon the policy which we elect to pursue. If we choose imperialism, then it is true, and the lessons of organization and of armament which the war is teaching are valuable indeed. On the other hand, if we are content with our own ideals, the fact of this war will be a bulwark of defense. For it shows that this is a warlike people; that it does not count the cost in following an ideal; that it

does not threaten merely, and that it knows how. Such a reputation is worth armies and navies in defense, while the small establishment, small but efficient, which has been our usage, is a pledge of unaggressiveness.

In one respect I believe that we might well copy the older powers—in the protection given to our subjects and their property the world over. Not like a swash-buckler, but like a guardian, calm but strong, we should protect our interests and collect our dues. And if this duty led us to Smyrna, to seize an equivalent from the Porte for the American losses in Armenia, it might prove a useful lesson to all the world.

A few words, finally, as to our attitude toward Great Britain. The cordial sympathy of that country with this during the Spanish war; its belief in our honesty of purpose in commencing that war; a fancied identity of commercial interests in China—these reasons, together with a sense of our common heritage of speech and law and ideal, have led many to believe that these two great nations could be harnessed together by a treaty of alliance, and made to pull with even trace the car of progress.

Cordiality, mutual sympathy, belief in one another's sincerity, pride in our joint inheritance—these qualities the two *peoples* may cherish and should cherish; an alliance between the two *governments* is a far different

and more doubtful policy. It would entail for us an immediate plunge into the whirlpool of continental politics; the assumption of unwelcome and unwonted responsibilities; the straying from the path of our natural and wonted development. For, if either party is attacked, alliance means war. Harmony, agreement, a good understanding — these we can strive after; these we can perhaps insure by aid of an arbitration treaty, upon which as a foundation the *entente* can be built up. But let each nation play its own hand, judge of its own duty, solve its own problems in its own way.

What destiny the coming century has in store for our beloved land, who can tell? It depends upon the moral qualities of our race, exemplified in government. We shall need high aim and integrity of purpose. We shall need robust common sense. If these pages contribute in any degree to a calm and sober judgment of the vital issues of the future, they will have served their end.

T. S. WOOLSEY.

YALE UNIVERSITY, July 21, 1898.

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OUR FOREIGN POLICY, AND ITS
RELATION TO DOMESTIC
PROBLEMS

AN ADDRESS

BEFORE THE AMERICAN SOCIAL SCIENCE ASSOCIATION,
SARATOGA, SEPTEMBER, 1897

OUR FOREIGN POLICY, AND ITS RELATION TO DOMESTIC PROBLEMS

STATE policy is an ever-changing thing. Rarely can a country, in the nature of things in this mutable world, pursue an identical line of action seeking a certain end until that end is accomplished. Sovereigns and ministers die or change; unexpected problems, unforeseen difficulties, arise; the nightmare of one generation may become the ideal of another.

Moreover, new outlets for national expansion are found, and a spirit of colonial adventure crops out now and again which tempts nations to their hurt. Thus the German Empire to-day has been led into a policy of naval development and African land-grabbing which is quite inconsistent with its traditions, its genius, and its capacity.

Or the march of events brings about the inevitable, and we see a state with its mind made up to accept what a previous generation

would have accepted only at the cost of war. Even now we are wondering whether England has not acquiesced in Russia's passionate desire for a Mediterranean outlet. If so, in this century-long movement of Russia we should find an exception to the rule: she would have pursued a single end until its accomplishment. And in her case this would be more probable than in that of any other power, for her government reflects the arbitrary rule of a single family. The more representative the government, the less continuous the foreign policy. This is the law which we should expect, and in our own case this law obtains. As one party succeeds another in power, it does not hesitate instantly to undo what its predecessor had arranged. Thus, to go back a few years only, Mr. Bayard tried to protect seal life by diplomatic agreement, Mr. Blaine by assertion of ownership; President Harrison attempted the annexation of Hawaii, President Cleveland negatived it; one party built up a set of reciprocity treaties upon its tariff foundation, the other altered the tariff and the treaties lapsed. This want of continuity in its foreign policy must be a sad obstacle to our successful diplomacy, but it is inevitable in a government by the popular will. As it limits the reliance which other states may place upon our aid and our attitude, so it must

necessarily weaken our right to leadership and powers of initiative.

While all this is true, in one respect this country has pursued with fair consistency a policy of abstention from European complications. Maintaining an attitude of self-defense and insisting upon its rights, throughout the century now closing, it has enlarged and defined its borders as against Great Britain and Russia and Mexico, France and Spain; but again and again it has declined those steps which would tend to make it a sharer in the problems of continental Europe. Washington's position at the end of the eighteenth century has been our position throughout the nineteenth. And the reason is easy to see. Our national expansion has been upon internal lines. There has been room at home for all the energy, the commercial growth, the national development of which the country was capable. A broad belt of continent was to be conquered, and the century has been devoted to the task. Is the work finished? Must we now look outside of our own borders to find room for our expansive energy? Have we achieved such results in material growth, in political development, and in the solution of social problems that we can fairly go to less fortunate peoples, with our birth-right in our hands, and say to them, "Come,

share our heritage with us"? Is a forward policy, an aggressive policy, an expansive policy for the future, consistent with our internal growth and the wise solution of the problems confronting us? This is likely to be one of the serious questions of the next quarter-century. Already there is evident a tendency to view our foreign relations from a new point of view. We are dividing into conservatives and forwards—to use a term which avoids characterization. We do not as yet share directly in European politics; we do not lift our voice in the "concert" of the powers. Our changing attitude is seen, rather, with regard to European relations with the states of the American continent.

If we examine various significant acts of our national government and couple with them the passionately urged opinions of many of our senators and congressmen, backed by a fairly extensive portion of the press, we shall find, I think, a somewhat indefinite program, but one positively held and urged, and with a single end in view—the territorial growth of the United States and the extension of its influence upon this continent.

Disclaiming—as yet, at least—a desire to share in European affairs, these forwards say: "America for the Americans." They assert that because we play no part in Europe,

European powers must in turn refrain from mingling in American affairs, and that, in fact, the time is ripe for a declaration that no European sovereignty can be permitted to control territory on this side of the Atlantic. It is, of course, a *non sequitur* to argue that, since we have no hand in European affairs, they must put no finger into ours. For our policy—as every policy must be—was and is determined by our own sense of expediency; it is not a matter of right or of reciprocity.

One of the phenomena which indicates this change of attitude alluded to is the growth of belligerent feeling which has accompanied the recent increase in our naval strength. Perhaps the naval growth is itself a sign, but I prefer to think not. For the revolution in naval architecture since our Civil War has demanded a completely new navy to put us in the same relative position as formerly. The prime object of a navy is to protect the persons and the commerce of a state's subjects the world over. In building a navy before enacting such laws as will give us a share in the world's carrying-trade, we are open to the charge of putting the cart before the horse. Nevertheless there are many interests to guard in foreign ports besides a carrying-trade, and the United States must perform, with other powers, the duty of policing the seas, of furnishing protection

to its subjects among the uncivilized races, of ceremonial observance, of neutrality enforcement, besides making itself ready for a possible war of self-defense. But if, instead of trying to build up our trade and protecting our citizens and enforcing our laws, we use this weapon to threaten others with, it is an abuse. Fortunately there are as yet no very flagrant instances of such abuse. The truculent spirit which I have in mind, which we are apt to call Jingoism, has not been often translated into action. But it is suggested by our attempt, during the Harrison administration, to protect the seals of Bering Sea as a matter of right instead of by international agreement; by the sensational chase of the Chilian ship *Itata*, a vessel, as our courts later declared, engaged in legitimate commerce; by the reproof of a navy officer who failed to protect General Barrundia from the laws of his own country, violated by him, when he was within its jurisdiction; most of all, by the frequent and ridiculous outbursts of temper on the part of individuals in and out of Congress, who insist that the navy shall blow some one or something which displeases them out of the water. It is the unpleasant habit of "pulling a gun," which obtains in certain parts of our country, raised to a national usage.

Another example of a similar tendency is

seen in the extension and more emphatic assertion of that article of our national policy which we call the Monroe Doctrine.

When we were small and weak as a people, it was natural to think that the imposition of a European sovereignty upon a minor American state, against its will, might threaten us as well as hurt it. But the richer and more powerful we grow, and the less this danger really exists, the more vociferously we profess to fear it.

This topic has been so thoroughly threshed out in recent discussion, however, that I turn to another which is perhaps more important, namely, the position we shall elect to take in regard to a Central American canal connecting the oceans. Here what is wanted now, and what has been consistently planned for in our past diplomacy, is such a condition of security and stability, of peaceful construction and peaceful maintenance, as will enable such a beneficent public work to be built. This has been attempted by guaranteeing its neutrality and its freedom from the exclusive control of any single nation. This policy the forwards seek to change. If a treaty stands in their way, as the Clayton-Bulwer convention does, it must be abrogated. If a canal is to be built, we, and we alone, they declare, must control it. And why? Solely because such control will add to the effectiveness of

our fleet by giving it peculiar facilities of mobilization and operation upon both our coasts. The price which we must pay for this privilege is such an increase of our army as to garrison and hold the canal against local insurrection or foreign attack; a large increase of our vulnerable sea-coast; and the reputation of a national breach of faith. To this heavy cost in taxes, in risk of foreign embroilment, and in dishonor, should be added the damage to our commerce which would be likely from its use of a canal subject to the hazards of war, instead of free from those hazards, as an international guaranty of neutrality would make it.

Perhaps the most striking feature of that wave of public excitement which was aroused by the Venezuelan difficulty of 1895-96 was the revelation, by Congress and by a large section of the public press, of deep-seated hatred of England.

Was this an inheritance from the last century? Was it an outgrowth of the Civil War? Was it the result of Irish influence in American politics, or because England was a gold-standard country or believed in free trade? Or was it simply an evidence of the nervous, excitable, volatile American temperament, which now and then leads this peaceful people into an absurdity of warlike desire such as followed the *Virginus* capture and

the attack upon the *Baltimore's* crew in Valparaiso? Whatever the explanation may be, whether it is one or all of these, the existence of the feeling is a phenomenon which has surprised calm observers in this country and has shocked and amazed the British people. More and more it can be used by demagogues in this country to further their own ends. Is it a question of tariff? Then that tariff which will make England smart must be the right one. Is it a question of currency? Our system must run counter to that of the "robber" nation to be satisfactory. Or is there an arbitration treaty proposed to lessen the chance of war and insure a ready and peaceful settlement of nearly all disputes? It must, *per se*, be a mistake because of its origin; some insidious British wile lies hid in it.

There was another reason for the defeat of the arbitration treaty. It came up for ratification at a time when the Senate was engaged in contest with the executive branch of the government over the right of initiative in our foreign relations. "We order you to recognize the independence of Cuba," said the Senate. "You cannot, and we will not," replied Mr. Cleveland and Mr. Olney, following an unbroken line of precedents. Accordingly, the arbitration treaty was so amended by the Senate as to keep the power of reference to the treaty courts in its own hands,

which was one of the very things which the people at large desired to avoid.

To curtail the powers granted by the Constitution to the executive, to keep alive an active distrust of and hostility to Great Britain, to play an aggressive part in our relations with other powers, to assume a headship of the states of the American continent, with a vague yet dangerous responsibility for them to correspond—such is the forward policy. And it is more—and more definite—than this. It contemplates the annexation of Hawaii, on account of its strategic position at the meeting-place of the lines of travel in the Pacific. This, the first and easiest step in the program, is also the least objectionable, judged by itself alone, yet seems to be not without complications. It desires some form of control over Cuba also, because Cuba would be the key to a Central American canal. It even dreams of Mexico and Canada as our eventual possessions. Thus it aims at extension of territory as an aid to extension of power. The question whether this people needs now, or will soon need, more land to grow over, is one about which anybody may have an opinion. We see now that the Louisiana purchase was a far-sighted sagacious step. The annexation of Texas and conquest of California may be criticized as a wrong to Mexico, but were

essential to our symmetrical development. And lately Alaska has begun to evidence Mr. Seward's skill in land-speculation. May it not be that further extension, in years to come, will prove to be equally praiseworthy? Possibly. Yet there are two or three considerations which should not be lost sight of. Except in the case of Alaska, these earlier additions were of contiguous territory. They did not present the problem of ingrafting distant colonial government upon our system. Moreover, they were of territory practically unoccupied. They did not involve the difficulties of administering the affairs of alien races in full control and ownership of foreign soil. And, most of all, they were to provide room for a nation's growth of population, not to enhance its strategical position.

If the annexationists allege the need of wider limits for our growing millions, it is one thing. With the census maps before us, we can judge of the necessity. But if their reasons are political and military, if their coveted soil is already thickly settled, it is quite another. When Jingoism ceases to be merely the stock in trade of the demagogue, and aspires to expression in political action, it is time to judge it seriously.

What now is the conservative policy to contrast with these aspirations? It may be expressed by a single phrase—the settlement

of domestic problems uncomplicated by foreign questions. Slavery and States' rights, as great political problems, have been settled. But the currency, the tariff, the way of escape from machine politics, are difficulties which still confront us, besides various minor but by no means unimportant movements, such as the reform of the civil service, a better banking system, forest preservation, reform in municipal administration, and railway-traffic regulation. The first two of these have formed the dividing-lines of our political parties since the war. It has been hoped that a compromise tariff could be framed which might be stable. Although drawn on the lines of protection, it should be so moderate and so productive of revenue as to disarm the opposition of the free-traders. But of this, unhappily, there is no sign. The pendulum even now has swung back, the highest of high tariffs has been enacted, after a year or two of over-stimulation the reaction will come, and the whole dreary contest must be fought over again. Even more dangerous is the currency question, with which a faulty banking system is entangled. Our currency defects have grown out of a popular delusion which was fostered by the necessities of the Civil War and the legal-tender decisions. By this delusion a large number of honest and in the main sensible citizens have been led to

believe that the government stamp upon metal or paper originates value. If value is created by stamp in accordance with a vote, the next step is naturally to create as much value as possible and put it in the hands of the people as widely as possible. This menace to the stability of our measures of value introduces a cause of insecurity, of bad times, from which our chief commercial rivals are free. Like us, they may suffer from over-production, from over-expansion of credits; they are liable to vast strikes and serious panics; they are peculiarly subject to the malign influences upon commerce of the hostile rivalries, the attitude of armed expectancy, which pervade Europe; but they at least know in what medium their contracts are to be carried out. They are free from the supremest blight which trade can be subject to.

This is all a commonplace; we shut our eyes to it when we can; but now and then the evil rises to tragic proportions, and all property interests are forced together into an ill-assorted union in simple self-defense. Now, to cure this most dangerous condition will require not only long-continued agitation and education and the honest and able efforts of a whole united party; it needs also an exemption from the kind of complication which caused it, that is, from war, or any

other great national expenditure which its ordinary resources are unequal to. This, perhaps, will suggest a certain subtle connection between Jingoism and the fiat-money advocates.

Still more of a commonplace is the effect upon legislation of our caucus system and of the mastery of the party through the mastery of the intricate machinery of the party. That mastery will always be better understood by the man with special interests to serve than by the man who only tries to serve his country. How much wearisome talk there is as to the duty of good citizens to go into politics! They do go in, if they can get in, but their families must be supported meanwhile; and unless they too make a living out of politics, except in rare instances, they will find the machine men in control. They are powerless in the grip of the caucus. If you change the machinery by some popular uprising, and flatter yourself that by so doing virtue is secured, you presently find that the rascals have got the better of the new machinery but too easily. If you do away with all machinery, and legislate by the direct vote of the people, you will but substitute government by newspaper for government by caucus. If you attack the evil at its root, and try to limit universal suffrage by qualifications, you attempt the impossible. The

tendency is all in the other direction. "*Facilis descensus Averno; . . . sed revocare gradum, . . . hoc opus, hic labor est.*"

With these various evils we are face to face. Even now cool-headed men, not too optimistic, are asking themselves whether we are not watching the breakdown of our representative system of government. Unless that system can be reformed and purified, the breakdown may come, and it will not be a safe or an agreeable spectacle.

Perhaps I have been led aside from my argument a little. What I desire to insist upon here is the urgent and absolute necessity, if we are to have a strong, a united, a prosperous nation, of settling these vital questions, settling them right, and settling them soon.

And this leads us to our main contention, namely, that such settlement is absolutely impossible if the program of the forwards is carried out; for we cannot set our house in order if we must spend our energies in its defense or in attacks upon a neighbor.

An aggressive policy is the forward policy, and it leads to foreign complications, to expensive armaments, and to war. This was clearly true of the problems that are now so happily behind us. Slavery required slave territory for expansion and for the political balance. This led to a desire for Cuba, to

filibustering in Nicaragua, to the annexation of Texas, the conquest of California, and the shame of the Mexican War.

The States' rights doctrine was also an aggressive one. It bred civil war and threatened the dissolution of the Union. And this is natural; for every policy which threatens the rights of others, abroad or at home, must inevitably lead to a defense of those rights. Aggression implies resistance.

There is one unvarying demand in all the forward policy, in the cry for more territory, in the hostility toward Great Britain and Spain, in the assertion of our headship of this continent, in the claim of control over an isthmus canal, and that is for ships, soldiers, and money. Without these this policy is pure bluster. To make it effective no one can tell the cost. This means heavy taxation. Thousands of miles of seaboard, dozens of harbors and coast cities, must be provided with defense. We must build a navy to match England's, must maintain an army to man our defenses, to garrison our foreign possessions, to hold our canal, to warrant our claim to dictate to a continent.

Our wonderful progress in wealth has been owing largely to two causes, cheap land and the freedom from a standing army, that millstone about the neck of an

industrial nation. As our cheap-land supply is giving out, we are asked voluntarily to throw after it the other advantage and assume the military burden.

We spent in 1896 upon our army and navy establishments seventy-eight millions of dollars. Yet in return for this large expenditure our navy stands only fifth in armored ships and seventh in officers and men, while the army, with less than twenty-five thousand enlisted men, is little more than a police force to secure internal security. Simply doubling the army and trebling the navy would cost one hundred millions additional yearly, without counting a system of coast and harbor defense. Even with this increase we should be poorly equipped to carry on a foreign war. To tell the truth, our enormous pension expense is our substitute for the cost of a military establishment, and could not be maintained if that were assumed.

Is it not clear that the tariff question, for instance, must be immensely complicated by an increase in taxation sufficient to carry out this new policy? It could not be settled on its merits. The need of revenue would affect every schedule, and hardly to the advantage of the manufacturer, for the duty must be low enough to admit goods freely in order to be productive. Or else internal

taxation and an income tax must be resorted to.

But this is not the worst of its results. The forward policy tends to keep us constantly in hot water in our foreign relations. Already we have a "question," a "difficulty," with Germany over the interpretation of the most-favored-nation clause, with China in regard to immigration, with Canada about the seals, with Spain about Cuba, with the Japanese over their rights in Hawaii. But in the brave time coming we shall show our mettle to every state in turn which tries to limit our pretensions. If this leads to rumors of war, as we know by hard experience, our trade suffers. It is no exaggeration to say that the consequences of the Venezuelan policy led straight to Bryanism, for the apprehension of war with England crushed the promising trade revival, and business depression led to political upheaval.

If our aggressiveness should lead to war itself, we are tempted to issue forced loans and call them money. The discontent from hard times, the distress and loss of credit from war, either one, would imperil the hope of establishing a sound financial system.

There is another connection between burning questions of foreign policy and the solution of domestic problems which is no less certain and even more insidious. The old

solidity of our political parties has been broken in upon. We have Gold Republicans and Silver Republicans, their differences too deep for common action. We have Silver Democracy and Populistic Democracy, and Populism of several shades. And we have a growing tendency toward that independence which picks and chooses its candidates and its principles without regard to consistency or party loyalty. This state of flux, of instability, is the despair of the politician. What a godsend to him, therefore, would be such a foreign embroilment as would replace or at least overshadow in the party platform and in the popular mind these difficult internal problems! To divert the people from the real questions at issue; to excite their war-like desires by emphasizing some petty injury or fancied danger; to sweep them into a vortex of passion, miscalled patriotism—what a golden opportunity for the demagogue, but what a detriment to good government and useful legislation! “Patriotism” has already been given a heavy load to carry. How often during the past year or two the hesitancy of a thoughtful mind to recognize Cuban belligerency or to intervene for Cuban independence, to face England down in Venezuela, to play the bully whenever and wherever opportunity offers, has been denounced as a want of patriotism! So that

the conservative citizen who deplors the effect of foreign adventure upon his country's prosperity and business is declaimed at from the lofty heights of patriotic fervor, until he too begins to think that black is white, and wrong is right, and love of country means love of a row. Yet the demagogue is not the real patriot, nor is truth falsehood. So the perplexed citizen betakes himself to his "Faerie Queene," and draws temporary solace from the piteous story of Una and the red-cross knight, buffeted by the wiles of Archimago.

The guilefull great enchaunter parts
The Rederosse knight from Truth:
Into whose stead faire Falshood steps
And workes him woefull ruth.

The extreme difficulty of settling domestic questions of vital importance rightly if they are complicated by foreign embroilment; the positive danger to the integrity of our politics if the pseudo-patriotic chord can be played upon at will by the demagogues; the mistake of substituting foreign adventure for internal development in our country's advancement—these are the reasons for believing that the old way is the best way.

Danger from the aggressions of other countries, in my judgment, does not really exist.

This nation is too populous, too rich, too strong, potentially, in war, as well as too isolated, to fear for its own integrity. Its dangers lie in its own follies, its own ignorance, its own blunders. With a moderate settled tariff, a sound and stable monetary system, a conservative diplomacy backed by a rational method of settling its disputes by arbitration, we may build, on the foundations which our fathers laid, the fair structure of an enduring state, which shall continue to be the world's great object-lesson in self-government, whose instrument shall be the plowshare, not the sword, which shall be trusted by the nations, and which, through the arts of peace, the skill of its artisans, the honest toil of its farmers, the wide-spread education of its people of every degree, may, in God's providence, attain the only kind of headship worth having, that of character and of worth.

THE CONSEQUENCES OF CUBAN
BELLIGERENCY

YALE LAW JOURNAL,
MARCH, 1896

THE CONSEQUENCES OF CUBAN BELLIGERENCY

SOME time since there appeared in a leading New York paper this statement: "Señor Palma, now delegate of the Cuban revolutionary party in the United States, will be the accredited minister of the new republic at Washington, if President Cleveland acknowledges the belligerency of Cuba." It is hardly probable that any student of our foreign relations would be deceived by so palpable a blunder as this. The recognition of belligerency, when accorded to a people trying to fight their way up to statehood, carries with it no right of diplomatic intercourse. If it did, it would be barely distinguishable from a recognition of independence. But there are various consequences—positive and negative—which *do* flow from the recognized belligerent status, which may not be so clear, and I have thought it might be of interest to see them briefly set forth.

Not that a recognition of the Cuban bel-

ligerents is at once necessary or proper. That is not a matter to be decided by sentiment. If one state takes the part of an insurgent body in another, through sympathy with its wrongs, and desires to aid it, that is intervention, not recognition. The recognition of Cuban belligerency should be governed by the interests of this country which are involved; by the ascertained existence of a civil and military organization, responsible for its acts and conforming to the rules of war; and by the gravity and character of the contest. Or, to put it more specifically, if the United States finds its trade considerably affected by the acts of war of a new *de facto* state, possessing a definite territory where the old sovereign no longer controls, it recognizes that new body as a belligerent, and holds him responsible for his conduct for its own sake.

In regard to these essential facts in Cuba it is rather difficult to find out the truth. Until the Cubans possess some of the ports of the island and carry on war by sea, our shipping interests cannot be much involved. On the other hand, there must be losses of sugar and tobacco property in the interior belonging to Americans, the responsibility for which will need determination.

However, it is not the expediency of a recognition of Cuban belligerency, but the

legal consequences flowing from such recognition, that I would here discuss. Perhaps a consideration of the latter will aid in deciding the former. As between the parent state and the insurgent body, the relations are not changed by an outside recognition of the latter's belligerency. In theory the insurgents may be considered traitors and be dealt with in accordance with municipal law; but in point of fact the executive branch of the state will probably accord them the rights of belligerents, being guided first by the dictates of humanity, and second by the danger of retaliation.¹

But as between the insurgent body and other powers, a new relation is introduced, that of neutrality. The revolutionary flag will be recognized, so that ships bearing it, in spite of the lack of ordinary clearance papers, will be received at foreign ports as having a definite standing. Thus, early in our Civil War, the *Sumter* put in at Curaçao, Holland having recognized the belligerency of the Confederacy. The commission of the *Sumter's* captain was accepted as granted by a lawful belligerent, and the ship admitted on the same footing with ships of the North, though Mr. Seward tried to fasten a piratical character upon her. A better standing will be gained for the borrowing of money,—an

¹ Case of the *Amy Warwick*, 2 Black. 635.

act which is based upon future expectations, —because the recognition is a stamp of success up to a certain point, and therefore encourages those expectations.

The insurgent men-of-war will be entitled to the same hospitalities as well as limited by the same restrictions in neutral ports as the ships of the parent state, except so far as these may be modified by previous treaty. For, not having acquired statehood and the right of negotiation, the revolutionary body can have made no treaties. Neutrality thus becomes a real and practical thing, and its machinery—neutrality laws, foreign enlistment acts, or whatever other name such regulations may bear—is put into operation. If a “recognized” insurgent blockades a port after due notification, the neutral submits to such blockade. It admits his right to search for and seize contraband articles belonging to its subjects and destined for his enemy’s use, on the high seas. The insurgent thus gains considerably from recognition of his belligerency. He gains in *caste*; he gains in rights; he gains in the facilities for carrying on war.

But his enemy gains as well and as much, also, with reference to third parties.

A state of war is declared to exist. As a lawful belligerent the parent state may blockade, and search and capture for carrying contraband, and exercise all the rights of war

and insist upon all the neutral duties, which during an unrecognized insurrection would not come into being.

Thus, during the Civil War of 1861-65, the blockade of the Southern ports, a powerful and unmatched weapon in the hands of the North, was a belligerent right, its observance a neutral duty, which foreign recognition of Southern belligerency made possible. For blockade is a war right solely. When President Lincoln laid the blockade he virtually recognized the belligerency of the Confederate States himself. During war, too, the neutral state is responsible for the conduct of its subjects; it is held to a stricter and more exact accountability than it can be as a mere friend regarding the internal disorders of a fellow-State with very possible complacency.

There is another and most valuable consequence of the recognition of belligerency which the parent state enjoys: it is no longer responsible for the acts of the insurgents. They may injure the person or destroy the property of neutral subjects by land or by sea, and their *de facto* government is alone answerable. This is a tremendous weight off the shoulders of the existing state. If the insurgent body dissolves, its responsibility for such damage vanishes. It is the neutral who is injured that suffers without redress.

Yet that neutral has a certain interest, as

well as the other two bodies, in the results of this recognition. A state of war is declared to exist between two friendly belligerent bodies. For such a state of things its neutrality laws provide. Its citizens can be told just what they can deal in without seizure as contraband. Certain seaports are either open, or closed by blockade. It knows just what its duties are. The air is cleared. A state, jealously watching over the welfare of its subjects and their commerce, desires most of all to know exactly the conditions which apply to them. And it may have a certain sympathy for a struggling, perhaps a long-suffering, community, which finds expression in this way.

There are thus three sets of interests which are affected and altered by recognition of belligerency—those of the insurgent as regards neutrals, of the parent state as regards neutrals, and of the neutrals as affected by a state of war. Let us try to apply these principles to the case of Cuba.

The insurgents would have a better chance of selling bonds, a flag recognized by other states, and war rights against neutral commerce.

Spain would hold the United States government to a stricter accountability in the prevention of filibustering expeditions and the detention of ships capable of being used

for war. For all such breaches of neutrality the United States would be responsible in damages unless it could prove that it had exercised reasonable care and diligence.

Spain also would possess the rights of a belligerent against United States commerce, which is not the case at present. Thus, if the Cubans succeeded in capturing some or all of the seaport towns of the island, Spain, having control of the sea with her navy, could and probably would shut out all neutral trade from them through blockade. She would have the right of capturing all war material shipped from this country to Cuba for the use of the insurgents, whatever the ownership, even on the high seas. In enforcing these rights her gunboats could stop, visit, and search any commercial vessel of the United States. The *Alliança* incident would often be repeated, but on the high seas, while remonstrance or resistance would be unlawful.

Again, Spain would be relieved of responsibility for all damage done by the insurgents to the property of neutral subjects in Cuba, while at present in such case it is probable that she could be held liable.

The United States, in turn, confronted by a war between two lawful belligerents, must duly respect their war rights. Its merchantmen must keep away from blockaded

ports, must submit to exasperating search, can carry on trade in contraband only under penalty of the loss of the goods, and often of the ships as well, if caught in the act. Its citizens owning property in Cuba would find it indistinguishable from belligerent property and subject to all the casualties of war. Its citizens who evaded our laws and sought service in the revolutionary army would lose their right of protection and must expect the same treatment that the insurgents met with. And its trade with the island in certain contingencies would be entirely cut off, so that the interchange of breadstuffs and manufactures for sugar and tobacco would be as dead as the cotton trade between England and the South during our Civil War, kept alive only by a few cargoes which ran successfully the risks of blockade.

The treaty made with Spain more than a century ago, except those articles which are obsolete, has also a bearing on our subject, for its specific provisions must be added to the general rules of international law. Thus the list of articles which shall be considered contraband is there laid down, and Article XIV forbids the subjects of either state to accept letters of marque from an enemy of the other, under penalty of being punished as pirates. So that no United

States citizen could fit out a privateer in the Cuban interest. He would be violating treaty obligation and our own statutes as well.

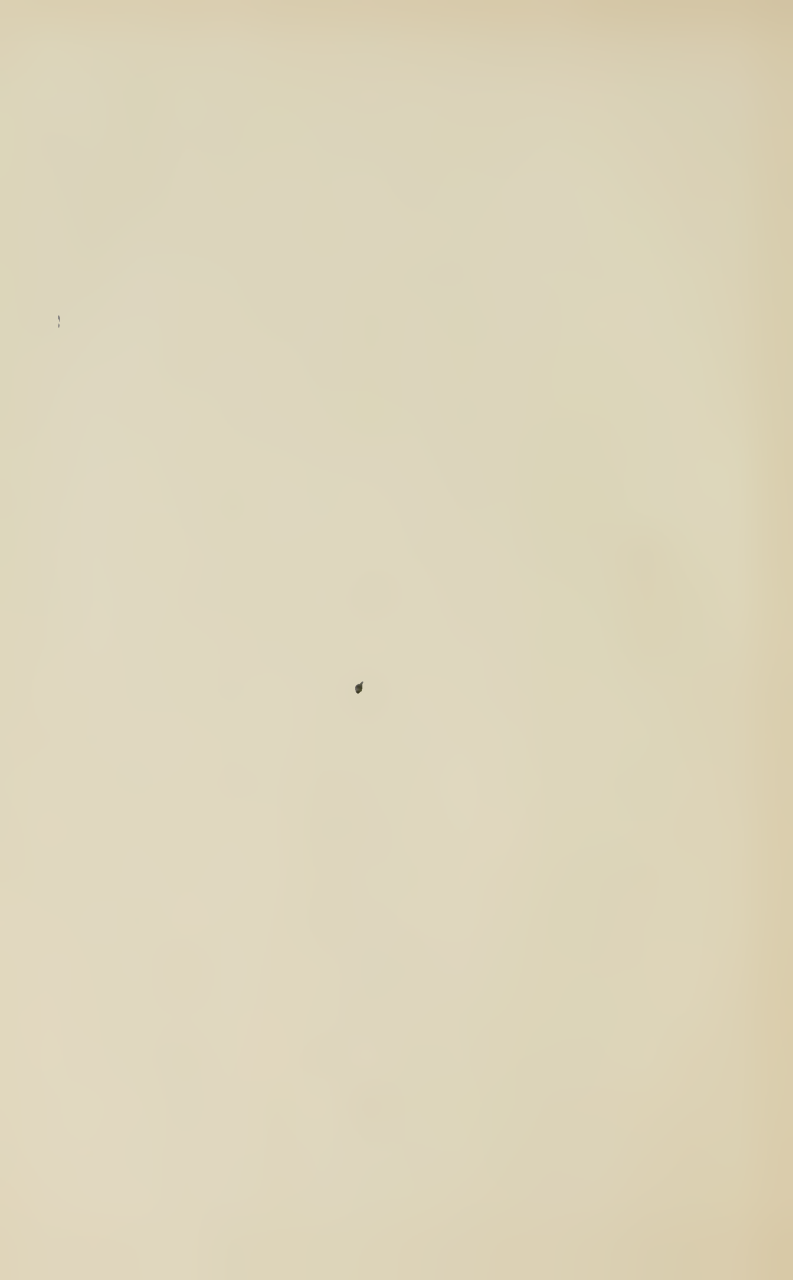
Bearing these legal consequences in mind, it is probable that our recognition of Cuban belligerency would help Spain first and most, the Cuban cause secondarily, and would be decidedly injurious to the interests of the United States. Recognizing this, one of the international jurists in the Senate advocates a recognition of independence rather than of belligerency. That, of course, would be a recognition of a fact which is non-existent, and must be avowedly a war measure aimed at Spain. France did this in 1778, by way of expressing her hostility to England, and war with England resulted as a matter of course. What the senator's cause of war with Spain is, he does not divulge. It is a source of wonder that no one has yet invoked the Monroe Doctrine in the matter.

Thus it would seem to be for the interest of the United States to let the present status in Cuba continue, rather than to recognize the insurgents' belligerency, an act which would be quite at variance with our own precedents. If recognition should be determined upon, however, Spain, though she might feel aggrieved, would not really be

injured; she would not be put in a relatively worse position for coercing Cuba. But to couple with this recognition a request to Spain to grant the independence of Cuba is a slap in the face.

OUR DUTY TO SPAIN

YALE LAW JOURNAL,
MARCH, 1896



OUR DUTY TO SPAIN

THE complaints which the Spanish ministry is said to have made to our government, of its laxness in preventing filibustering expeditions, have called out from the Secretary of the Navy an interesting rejoinder. The statement of Mr. Long attempts to show, on the part of the United States, a diligence in preserving its neutrality that is not only "due," but even unusual under the circumstances. This correspondence is not yet published. The mere fact of its existence and probable tenor is known. We cannot scrutinize the assertions of fact and law and precedent therein contained. Nevertheless, perhaps we may use the incident to advantage as a peg upon which to hang two inquiries, the one relating to fact, the other to law; the one recalling a bitter national controversy long since settled, the other concerning the duties of a state in view of an insurrection against a friendly power, an insurrection which cannot well be recognized as belligerent.

What a faint and far-away memory that phrase "due diligence" suggests! And yet in the *Alabama*-claims arbitration, a quarter-century ago, national responsibility and millions of dollars in damages rested upon its interpretation.

The military engines which the Southern Confederacy bought in neutral England prolonged the war, destroyed or drove to other flags the commerce of the North, and gave rise to the most serious complaints. Just so to-day, those military supplies which Cuba buys from the manufacturers of the United States are prolonging the insurrection, may make independence possible, and do much to disturb our friendly relations with Spain. They likewise may serve as a basis for claims for damages in no very distant future. There is an apparent parallelism between the two cases. Is it a real one?

The salient features of our relations with neutral powers during the Civil War were these: the recognition of Southern belligerency by the states whose interests were affected, which thereby declared their neutrality; the application of the rules of maritime capture to them by both sides in the war thus recognized; the sale of military supplies to the Confederates by neutral merchants, the onus of preventing their delivery resting upon the shoulders of the Northern

government; finally, the despatch of armed expeditions from British soil, coupled with their illegal armament and enlistment of men in British colonial ports, with great damage to American commerce resulting. There was a European sympathy for the Southern cause also, which was galling to the North; but it is the unneutral act, not the unneighborly sentiment, that international law takes cognizance of.

Turn now to our relations with Cuba.

As the Cuban ports of importance are all in Spanish hands, our shipping interests have not been so affected as to make the recognition of Cuban belligerency necessary. Therefore there has been no blockade, no right to capture contraband on the high seas, no right of search of American ships except within Spanish jurisdiction. As in Great Britain in our Civil War, there has been free sale of military supplies in our markets to the Cubans, but with the assumption that the burden of preventing them from reaching their destination rested upon Spain. And lastly, armed expeditions, that is, the combination of munitions of war with men enlisted to use them, have been checked and in large measure prevented by our government, at great cost and with much trouble, by many arrests, several trials, and a few convictions, so that it can honestly say, as

Secretary Long does say, that it has exercised diligence in this regard.

American sympathy for the Cuban cause exists. It is natural, even inevitable. It is galling to Spain. But we say again that expressions of sympathy are not within the cognizance of the law.

Reviewing the two cases, we see that they are not parallel, but in strong contrast.

The one was war, with neutral duties and belligerent rights. The other is an insurrection, involving no neutral obligations, strictly speaking, and no belligerent rights. The one put the duty of preventing contraband articles from reaching their destination where it belonged. In the other, Spain appears to shirk this duty; to try and place it upon the wrong shoulders. Negligence in the *Alabama*, *Florida*, and *Shenandoah* cases made Great Britain liable for the damage they caused, while no such scandal in connection with Cuba can be brought home to the United States. Its seaboard is long and intricate, the Cuban coast near, absolute prevention of hostile expeditions well-nigh impossible. But by the use of both navy and revenue service the coast has been so efficiently policed as to make the despatching of such expeditions very hazardous and very uncertain. Due diligence has been observed. Can more be demanded?

And now for the second inquiry.

What is the law to govern a state in its relations to a mere insurrection in a friendly country?

Is a state's own statutory law the sum and measure of its duty in the case?

How far does the character of lawful commerce attach to trade in military supplies with the insurgents?

Such questions as these have forced themselves upon both executive and judicial departments in the United States within the past three years. But there must naturally be a difference in their point of view. The executive is guided by the general principles of international law, and by its own conviction of national policy; while the courts, though also applying international law, must be specifically bound to employ and interpret the statutes enacted for the enforcement of that law. Violation of the rights of another power, by the executive, calls for redress. So, too, insufficiency of the statute, as interpreted, founds a valid claim for damages. But an unpalatable interpretation of a statute is not a ground for complaint, unless bad faith can be proved. Where an insurrection breaks out in another state it is to be remarked that one's own political relations with that state are necessarily affected, for it involves the commerce and the property

rights of our citizens. If of a character to warrant it, the insurrection will be recognized as belligerent. We are presupposing, however, that for one reason or another this course is inadmissible. There results no recognized war. There can, therefore, be no neutrality (since neutrality implies war), nor any neutral duties. We have so-called neutrality acts, which operate without war, it is true, but the "neutrality" is here merely a convenient name, and not a proof of status. The same thing in England is called a Foreign Enlistment Act.

But though there may be no neutral duties and rights, technically speaking, there are nevertheless the duties which every state owes to every other; there are the rights of commercial freedom which every state enjoys, and there is the right of self-defense, the duty of maintaining its own integrity, which the insurgents' sovereign possesses.

These fundamental rights do not depend for their operation upon any formal recognition of belligerency. Nor can I see that they are called into being or changed in any way by the newfangled recognition of insurgency—a phrase ascribed to the late Dr. Wharton. When an internal disturbance in a friendly state is serious enough to affect another state's interests, the executive consciousness of that fact finds expression. In

our own case the form of expression will usually be a reference in some message of the President to give notice of the facts and warn us to obey our own statutes. This is what is meant by the term "recognition of insurgency."

Now as to the private trade in war material. It is certain that such trade with an insurgent body is at least as lawful and unrestricted as with a recognized belligerent. The usage in the latter case is unquestioned. Private trade in contraband is permitted. Even where carrying contraband is forbidden by executive order, as is sometimes done,¹ this simply means, in actual practice, that the trade is liable to the penalty of confiscation, if the offender is caught by the injured belligerent. The neutral is never held responsible for the traffic in contraband so long as it is purely a commercial transaction. Accordingly, a body of law has grown up to govern such cases. States define contraband by treaty. Such goods may be seized, unless the treaty substitutes preëmption for confiscation. They may be seized on the high seas even, if their hostile destination is clear. In certain cases the ship is liable also. But the burden of prevention is not saddled upon the neutral. The law and usage are the

¹ *E. g.*, by both British and Spanish proclamations of neutrality at the outset of our Civil War.

resultant of two principles—the freedom of neutral trade, and the belligerents' right of self-defense.

In the case of insurgency rather than belligerency, the only question is whether the freedom of trade in war material is not enlarged, whether the right of seizure is not restricted to the coast sea of the insurgents' sovereign. In the case of an armed expedition like the *Virginus* there is authority and reason for believing that search and seizure on the high seas are warranted on the ground of self-defense. A similar claim to prevent the trade in war material would probably not be submitted to. However, for our present purposes it is not necessary to discuss this point. It is enough to emphasize the general law that no government can be held accountable for its citizens' traffic in military supplies not furnished to a visiting man-of-war, nor in the hands of an expeditionary force. Its duty is fulfilled when its subjects are warned of the risk of loss which they incur by engaging in it.

The distinction already referred to, between contraband goods which are mere commodities, and the same goods, it may be, with an organized body of men to use them, is a perfectly reasonable one. It is the distinction between trade and an armed expedition—between peace and war.

An insurrection breaks out in one of two states which are at peace. The other is bound to prevent all persons within its jurisdiction from assisting to wage war against its friend. Where a ship is armed or men enlisted and an expedition set on foot, with intent to assist the insurgent cause, that is waging war. If such acts are made possible through the negligence of the authorities, through lack of appropriate legislation, or through a judicial breakdown involving more than an unpalatable interpretation of the law, they are unfriendly and a ground for damages.

This, then, in its simplest terms, is the sum of the rights and duties which obtain between the United States and Spain at the present time: to carry on trade with the Cubans, even in war material, subject to the Spanish right of seizure within their own coast sea; to prevent our soil from being made a base from which Cuban sympathizers wage war against Spain. These two are the cardinal points, under the general principles of the law of nations.¹ Such general principles in a vital matter like this should and do find expression and sanction in local

¹ The simplicity of the rule may be complicated by actions which involve a violation or evasion of our revenue laws. Thus a ship with contraband and a commercial crew may clear for Havana, whereas her real destination is inferred to be some landing-place, not a port of entry, on the Cuban

legislation, and such statutes are interpreted and enforced by the courts. Neither insufficiency of the law, nor difficulty in enforcing it, will excuse a government. As our diplomats kept urging upon England in the *Alabama* discussion, "If the law is insufficient, amend it; if sufficient, enforce it."

Our next inquiry thus relates to the adequacy of our own statutes, and to the good faith and effectiveness of their interpretation and enforcement.

The statutes applicable to such aid as Cuba has sought are two, Sections 5283 and 5286 of the Revised Statutes of the United States.

The first is aimed at "every person who, within the limits of the United States, fits out and arms, or attempts to fit out and arm, or procures, . . . etc., or is concerned in, . . . etc., with the intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace. . . ."

coast. In this connection the *Itata* case at San Diego may be recalled, which ship took French leave of the authorities, and failed to comply with the port regulations; yet the court acquitted her of the charge of violating the neutrality statute.

Here the offense is to be committed by means of a vessel, and that vessel must be armed. On this ground some prosecutions have failed. Another point is that the vessel is to be "employed in the service of any foreign prince or state, or of any *colony, district, or people.*" Do the Cuban insurgents correspond to this latter description?

Mr. Justice Brown, in *The Carondelet* (37 Fed. Rep. 799), seems to hold to the contrary, and Judge Locke, in *The Three Friends* (78 Fed. Rep. 175), took the same view. Justice Brown said: "A vessel could hardly be said to enter the service 'of a foreign prince or state, or of a colony, district, or people,' unless our government had recognized Hippolyte's faction as at least constituting a belligerent." But the decision turned on another point. The contrary view was taken by Mr. Wharton and Attorney-General Hoar, who believed this statute applicable to and intended for just such an insurgent body as the Cubans form (166 U. S. Reps. 1); and this view was upheld by the Supreme Court in *The Three Friends* case, on appeal. Something of the same indefiniteness is found in the wording of the British Foreign Enlistment Act. This forbids similar aid given to "any foreign prince, colony, province, a part of any province or people, or any person or persons exercising or assuming to exercise

the power of government in or over any foreign country, colony, province, or part of any province or people." In the English case, *The Salvador*, the lower court held, like Judge Locke, that the statute did not apply to unrecognized insurgents in Cuba. But this decision was overruled by the Judicial Committee of the Privy Council (*The Salvador*, L. R., 3 P. C. 218). In view of the judicial interpretation of the American statute, we may conclude that, though not quite so comprehensive as the British one, it covers the case of an unrecognized insurrection perfectly well. In addition to this, Section 5286 is comprehensive enough to forbid such an armed expedition as would be obnoxious to the general principles of international law already laid down. This reads as follows: "Every person who, within the territory of the United States, begins, or sets on foot, or prepares the means for, any military expedition or enterprise to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, shall be deemed guilty," etc. Plainly, this statute is operative without any recognition of belligerency, and abundantly satisfies the requirements of international law which forbid one state to permit any hostile expedition to be prepared

within its jurisdiction against another state, its friend.

This, then, is the answer to the questions which we asked at the outset: that trade in military material is lawful to the individual; that the duty of a state is measured, not by its statutes, but by the requirements of international law; that if those statutes, as interpreted by its courts, are insufficient to lay down its international duties and prevent their violation, that state is liable; and that in the case of Spain and Cuba our statutes are not faulty, although one could possibly be made clearer and more comprehensive.

This Cuban insurrection, like the one in the seventies, has put the United States into a difficult position. Its trade has been cut off, its resources taxed, to preserve its neutrality. But, as several convictions show, and as the records of the navy and revenue service testify, it has performed its international duties with fidelity, with patience, and with success.

RESPONSIBILITY FOR THE "MAINE"

YALE LAW JOURNAL,
MARCH, 1898

RESPONSIBILITY FOR THE "MAINE"

THERE are two extreme views of the responsibility of the Spanish government in the matter of the *Maine* in case the accident-on-board theory proves untenable. The one holds that when a ship of war of one country enters another's port that other *guarantees* its safety from external dangers. The other maintains that under similar circumstances the actual complicity of the government must be proved to attach liability to it. Neither of these views seems to me to be warranted. Examine them a moment.

The first view is probably based upon a mistaken understanding of such cases as that of the United States privateer *General Armstrong* in the harbor of Fayal in 1814. An English boat expedition tried to cut her out. Her crew defended themselves for a time, then set fire to the ship and took refuge on shore. When claim for her value was made upon Portugal, whose jurisdiction had been violated by the attack, it was contested and finally re-

ferred to arbitration. The award declared that protection had been due from the Portuguese government, but that, since the crew had defended itself instead of appealing to the authorities, the latter were freed from further responsibility. But to argue that, because protection is due in a friendly port against belligerent attack, therefore protection is *guaranteed* against *all* attack, is to confuse between an act which openly violates neutrality, sovereignty, and international law, and an act which may be a skilfully devised and secret evasion of the local police regulations. In the one case the attack is twofold—upon a friend's sovereignty as well as upon an enemy's ship within that friend's jurisdiction. For its own sake as well as for its visitor's sake resistance to open attack is due. In the other case, with all the good will in the world, and with efficient harbor policing, it may not be possible to stop all secret machinations. Why should a state guarantee a degree of protection which neither it nor any other power has the ability to make absolutely effective? It is the duty of the United States to prevent filibustering, but it does not guarantee that it will be invariably successful. It uses those measures which appear adequate for the purpose, and denies further responsibility.

Now take the other view, that the Spanish

government has no liability except for the acts of its authorized agents. This is as much too lax a theory as the other is drastic. A government owes good faith, fair treatment, a desire to protect, as well as the mere order that its own servants shall keep their hands off. Its duties are not merely negative; they are positive. Its duty lies partly in controlling other agencies than its own official agencies, and a corresponding responsibility attaches. Otherwise through mere negligence a hostile-minded power could accomplish its ends and yet claim exemption from responsibility. A man is responsible for the acts of a savage dog which he owns, even when he does not himself set the animal on. If we pursue this analogy a step further it will bring us to the middle ground where the law and justice of this question are conceived really to lie. Suppose the dog in question is not savage, has never bitten a man before, but, being under considerable mental excitement, suddenly takes it into his head to commit a breach of the peace. If the animal's master has had no reason to suspect an outbreak, we do not blame him for not having chained the dog up. To found a suit for damages, negligence must be shown, and a jury will be asked to pass upon the question.

So is it in judging Spain's responsibility

for the loss of the *Maine*. Neither an accident on board, nor an outside attack resulting from the orders of the government, would present any legal question. Between these limits of undoubted responsibility lies a middle ground. We deny, on the one hand, that Spain can be held to have guaranteed the safety of the *Maine* within her waters; we deny, on the other hand, that Spain owed our ship nothing more than the abstention of her own officers from doing it an injury. We assert that the right rule is that Spain owed care and thought and good judgment and the use of her ordinary, or, if necessary, of extraordinary, agencies,—in a word, owed *due diligence*,—to secure the safety of the visiting man-of-war.

What is due diligence; what sort of diligence was due under the circumstances of this case—is not this a fair question for a jury for arbitration? But, generally speaking, *due diligence* would be that which was proportioned to a reasonable suspicion of risk, and to the results to be looked for from a failure to be diligent.

An illustration will better explain what is meant. The relations between the two countries were somewhat strained when the *Maine* steamed into Havana harbor. There her berth was assigned her by the harbor-master. If he was permitted or directed by

the officials in charge to place the ship over a mine, thus making the explosion at the hands of some unauthorized irresponsible fanatic at least possible, it was a failure of *due* diligence. So if the government became aware of a hostile feeling and movement among any class in Havana, directed against the *Maine* or the Americans, it was bound to more than ordinary care to protect it and them. When the *Vizcaya* came to our own port during a very excited condition of the public mind and temper, a greater degree of diligence was due for her protection than in the case of the *Maine*, and great diligence was shown.

It may well be that the board of inquiry will be unable to assign a cause, or fix the blame, for the explosion. In that case, if the principle we have laid down is sound, the Spanish government can only be held responsible in damages if it be shown to have failed to exhibit due diligence in providing for the *Maine's* safety.

CUBA AND INTERVENTION

NEW YORK INDEPENDENT,
MARCH 17, 1898

CUBA AND INTERVENTION

THE *Maine* explosion does not necessarily bring the relations between Spain and the United States to a crisis, but it certainly does not make them more friendly. The old difficulty remains, with the added knowledge that the report of the board of inquiry as to the loss of our ship *may* be definite enough to force the government's hand. There is, too, a fast-growing belief that the administration is at or near the intervention point. This belief is not founded upon any definite official statement; it is, rather, the result of a study of the preparations for war now making on both sides, and of a conviction that it is the logical consequence of the situation. There is, too, that subtle, unreasoning premonition of future events which, when widely shared, insures their fulfilment, not as the result of volition, but of impelling fate. Let us briefly review the situation, to determine if intervention is a justifiable course.

There has been an insurrection in Cuba,

which for three troubled years has disturbed our friendship with Spain. At considerable expense and with good success, our government has prevented the despatching of armed expeditions against the Spanish power in Cuba. The revenue-cutters and also ships of the navy have been used in this guard-duty. Many detentions and arrests, several trials, and a few convictions testify to the fidelity of the United States in this respect. Military supplies for the Cuban insurgents have been sent out from our ports, but that is a lawful traffic. The burden of preventing it belongs to the Spanish authorities in Cuba. Those authorities, inefficient in the discharge of their own duties, have incessantly complained of our negligence. They appear to have completely failed to appreciate our diligence in preserving our neutrality. I use the word "neutrality" for want of a better one, though there is no neutrality, technically speaking, when there is no recognized war. Spain also has our government to thank that no recognition of belligerency has been accorded. This would have been a lawful step, though, in my opinion, an impolitic one for our own interests. A recognition of Cuban independence would not have been lawful at any time during these three years, except as a deliberate war measure.

It is, then, my conviction that this country has not failed in its duty to Spain, though the performance of that duty has not been easy. A state will preserve its neutrality in war at all costs and as a matter of course. But it is a fair question whether, in a case of insurgency indefinitely prolonged, the same state is bound to the same duties.

There is another factor in determining our position toward Spain which is important. Our very considerable trade with Cuba has been reduced to a fraction of its former volume. Many millions of the property of our citizens, in sugar and tobacco, have been destroyed by both Spanish and Cuban soldiers. For all of this loss, in default of a recognition of Cuban belligerency, Spain is legally responsible. Yet who imagines that such losses can be collected? We see our property burned, our trade cut off, our commercial intercourse hampered in a variety of vexatious ways, yet with no end in sight. In President Grant's time we bore with a similar state of things for eight years. Are we called upon to suffer such losses, to make such sacrifices, for unappreciative Spain indefinitely?

And, thirdly, there is the argument based upon the claims of humanity. So long as the rules of civilized warfare were observed,

so long, that is, as the non-combatant population was not interfered with, there was little choice between the two parties. Occasional atrocities might be committed by either side, but neither side was so conspicuous a sinner as to warrant outside interference. The Cubans at least held their own. But there came a change of policy. The non-combatant country population was forced to settle within range of the guns of the Spanish, intrenched in the towns, and there, destitute of food, or of the means of growing or getting food, it starved.

A report of our consuls upon the condition of these people is soon to be made public, which very possibly may strengthen this argument. As a nation we have no special racial or religious sympathy with the native Cuban population. But it would be inconsistent with the spirit of our age and with the character of our civilization if we showed no horror at such a measure of coercion, no desire in some way to relieve such suffering. Can any relief be effective which does not remove the cause?

These are the three justifying reasons, then, for intervention—for the attempt, by national action, to heal this open sore: the burden of neutrality; the dictates of our commercial interests; the call of humanity. Any one of these is strong; together they

are very nearly convincing. And if our government should act upon them, I believe the opinion of jurists would incline to be that such action was warranted. This, at least, was the conviction of the present administration early in the year. Because of its remonstrances and wishes, there was made a change of Spanish policy in Cuba. Weyler was recalled, trade was made freer, and a system of autonomous government for the island was set up.

So far as its effect upon the insurrection goes, this change of policy has been futile. Whether the condition of the non-combatant population has been bettered is an open question which our consuls must answer. But it is clear that the trouble remains, that the real question is not materially altered. And I repeat the opinion that some form of intervention by our government is near at hand and would be justifiable.

Yet it does not follow that, because legal, it would be good policy. The two are quite distinct, to be argued on different lines. Here are some of the considerations bearing upon the question of policy in such intervention.

Shall it be immediate, or should another delay be allowed to test the scheme of autonomy?

Shall it threaten armed enforcement of its terms, or be diplomatic?

Is it likely to be resisted by Spain and to lead to war?

Are we prepared to carry on a war creditably, even with so weak a power as Spain?

Would the damage to our trade through a war be balanced by the future gain of getting rid of this Cuban incubus?

Would not the expenses of a war be heavy, and offer a dangerous temptation to the issue of paper money?

If a war were successful, would it not be likely to result in the annexation of Cuba?

Would not the annexation of Cuba be a serious strain upon our institutions and methods of government?

Is there no way of uniting other powers with our own in securing the pacification of Cuba?

On the other hand, is Spain likely to find allies in case of war with the United States?

These are questions which must be considered before embarking upon intervention, even if we fully believe intervention to be a right; for it is our own interests, broadly interpreted, which, after all, must govern. And in regard to these questions every man will have and should have his own opinion. It is enough to call attention to them. That they are being seriously studied, the present

attitude of Congress testifies. We hear but little Jingoism now; the crisis is too close at hand. May it be met firmly and wisely!

But little has been said in this discussion of the *Maine* incident. A finding of facts in that case, which declares the explosion to be either an accident from within, or the direct result of action by the Spanish officials, will involve no legal question of responsibility. But such a finding is not likely.

If the disaster is found to have resulted from an outside agency without specifying it, the question of the responsibility of Spain remains. This would depend upon the diligence shown in protecting the visiting vessel. Spain does not *guarantee* the safety of all foreign men-of-war in her ports. Neither is her responsibility limited to the action or connivance of her own officers. But she does owe a care or diligence in protection proportioned to the danger of attack and to the results likely to flow from negligence.

The question of *due diligence* and of *indemnity* in such case might fairly be left to arbitration.

THE WAR WITH SPAIN

AN ADDRESS

BEFORE THE YALE CLUB IN NEW YORK,
MAY 13, 1898

THE WAR WITH SPAIN

WHEN two states, after a long interval of peace with all civilized powers, actually find themselves at war, it is a shock and a surprise to each of them. The thinking men in each must inevitably question the necessity of war, ponder upon its justice, speculate as to its results.

A commercial people sees its trade interrupted or its credit attacked with discontent; a sentimental people finds itself involved in war, and shrinks from its passions and its bloodshed; a practical people realizes the enormous economic waste of war, and naturally asks whether it is worth while. There are a dozen different points of view, ranging from peace at any price, to war for war's sake; and, above all, there is the national point of view, which regards the acts of its own government with a certain partiality, which, natural and proper though it is, is hardly consistent with the judicial attitude. Now all these many and various interests

and tendencies and prejudices find expression, and their resultant expressed in action is national policy. It is wearisome, perhaps, but it is necessary, ever to insist upon the distinction between law or justice or right, on the one hand, and policy on the other. A state may possess a right to enforce which would be suicidal. Germany sends a cruiser to little Hayti to collect an indemnity. But let Hayti press a claim, be it never so just, against Germany in the same way, and snap would go the jaws. The *Reichshund* would make but one mouthful of the black and tan.

The national policy of Spain is easy to understand, because she is the victim of circumstances, not superior to them. She is a power of the first rank only by courtesy. Burdened with debt; threatened with revolution; her peasantry ill educated and priest-ridden, though frugal and industrious; between the gulf of Carlism and socialism and the burden of her misgoverned colonies, she is between the devil and the deep sea. Yet she stands confronting an evil fortune, somewhat bombastic, but brave nevertheless, and extorts our admiration. Her policy, then, is one of an almost passive resistance to an inevitable fate, negative, not positive, sharing neither the responsibilities of the European concert nor its honors. She is like one of

her own grandees, who, poor and proud and childless and well-nigh friendless, never loses courage or dignity or calm, and so awaits his end. We have a sentimental regard for him. But if he stands in the way he is pushed aside.

And what is our own national policy? Have we any? Or, rather, are we not ever halting between two? The one is freedom from foreign complications and the settlement of momentous domestic problems. The other means territorial growth by annexation or conquest; it means the headship of this continent; it means a share in the scramble for colonial aggrandizement; and in the background ever lies what the Europeans call Monroeism, which is either a rational principle of self-defense—the first law of nations—or a national fetish, meaning anything you may happen to choose.

With these preliminary and rambling remarks, I beg you to consider whether our present attitude toward Spain can be justified in law and is in harmony with sound policy. And later I shall touch upon the conduct of the war, so far as it has been developed, from the legal point of view.

Intervention by one state in the affairs of another is an exceptional thing, and needs to be justified. There are certain grounds for justification given in the books, such as

self-defense and humanity. But I am not aware that any publicist pretends to be able to lay down exactly the rules which shall govern intervention. And the reason is, because cases of intervention are so unlike one another, and because national policy enters so largely into them. Thus, Napoleon III intervened in Mexico, nominally to secure indemnities for French losses, really to check the political influence and trade extension southward of this country, and occupy the minds of his own people.

Thus, too, Russia intervened, in 1877, in behalf of Bulgaria. It was based in theory upon religious sympathy and upon humanity. It was a move, in fact, upon the Straits and Constantinople, in pursuance of Russia's century-long program.

Take another instance of intervention on the ground of humanity, that of the powers in Greece, in 1827, resulting in the destruction of the Turkish fleet at Navarino and Greek independence. Here is a somewhat close parallel to our own action in Cuba. In both cases there was oppression, misgovernment, revolt, cruelty, and resort to a war of extermination. Ibrahim Pasha was the prototype of Weyler. Greece found sympathy and aid in liberal England, as Cuba has done here.

And each case will be found, I think, to

be in harmony with the broad underlying tendency of the century. For, in spite of all their hampering jealousies, the powers have pushed, are pushing, the Ottoman sovereignty out of Europe. The carving of an independent Greece out of barbarous Turkey, unintended though it may have been at the outset of the intervention, was an early step in this direction.

So, likewise, though we may not all see it yet, the expulsion of the Spaniard from unhappy Cuba, whatever government succeeds, will be a mark of progress, of civilization, because it will open the island to civilizing influences under the auspices of its own sons. Good government it may not have. There is no magical efficacy in the republican label. Better government it will have because none could well be worse, and because it will be its own. This, too, will be in line with the century's tendency and our own prejudices, which incline toward the freedom of American soil from the grasp of European officialism.

It may yet be that we shall carry this parallel one step further, and find in some hitherto unhistoric spot a counterpart to Navarino.

That intervention on the ground of humanity is justifiable is a matter of precedent, then, as well as a theory. And so

far as facts go, our action in behalf of Cuba is as fair an instance of it as any of the earlier examples. For it is clear, from the accounts of correspondents and visitors of various nationalities, from the reports of our consuls, from the experiences of the Red Cross Society, yes, from the confession of Spain herself in the appropriation of money to relieve starvation, that in a very garden of fertility thousands upon thousands of wretches have died from lack of food. And we cannot but infer that this is a result of the concentration system devised by General Weyler.

But it is not on the score of humanity alone—to check a war of extermination, to prevent barbarities practised upon non-combatants—that the President justifies intervention. He declares that the interests of this country are deeply involved, that it is confronted by a condition of things close to its own shores which has become intolerable; and he specifies the damage to our property and trade, and the burden laid upon our shoulders of preserving our neutrality, as examples of this. In short, it is a case of self-defense, defense of this country's vital interests, though not, of course, of the stability of its institutions and form of government. It is interesting to compare this plea with the similar one which President Cleveland

put forth when he intervened between Venezuela and Great Britain in their boundary dispute. His statement was as follows: "It may not be amiss to suggest that the doctrine upon which we stand is strong and sound, because its enforcement is important to our peace and safety as a nation, and is essential to the integrity of our free institutions and the tranquil maintenance of our distinctive form of government."

In Venezuela there was no injury to our trade, actual or threatened; there was no policing of our shores necessary. The most that could be said or could be feared was this, that Great Britain was showing a disposition to edge up on a weak South American republic in the matter of territory, acting, of course, in behalf of its British Guiana colony; that such a disposition remotely threatened to be applied to ourselves, after it had absorbed the intervening ground, and that therefore it was time to check it.

It requires imagination to see this danger and appreciate this argument, but Congress and the country generally had plenty of it, and backed the President in his theory of self-defense.

In Cuba we have seen millions of American property destroyed by both parties, and with small chance of future compensation. We have seen our trade reduced to a frac-

tion of its former value. We have been put to serious trouble and expense in guarding our neutrality. We have suffered political disturbance and business panic from the neighborhood of this long-standing evil. Yet there was no sign of its coming to an end. Truly it has been an intolerable condition. To my mind this is a genuine case of necessary defense of national interests; the Venezuela intervention, a fictitious one.

It was natural that Spain should fail to see the force of our complaints, of our reasoning. She had complaints of her own. For though admitting diplomatically, at a very recent date, that the conduct of this country had been correct, she was conscious of a wide-spread sentiment adverse to her and her methods; she knew that the Cuban insurrection had its headquarters in this country; she learned of the constant despatch of military supplies to her rebellious subjects; she saw that in spite of our watchfulness armed expeditions were fitted out, and some of them landed in Cuba successfully, while of those seized and tried by our courts not all were convicted. And constantly recurring in Congress came attempts to recognize Cuban belligerency or independence, pressed in language so abusive and in ways so hostile that Spanish resentment was abundantly justified. I shall say but a few

words in regard to Spanish criticism of our national attitude. An anti-Spanish sentiment was inevitable, but it is upon illegal acts, not hostile feelings, that national complaints can be founded. The sending of war material to the insurgents by individuals in this country is a lawful trade, the right and duty of prevention belonging to the Spanish authorities in Cuba. They have assumed the air of expecting us to do their work for them.

The equipment and despatch of filibustering expeditions, so called,—that is, ships carrying an organized and armed body of men intending to carry on war with a state with which we are at peace,—has been checked by the government, though not absolutely prevented. Our long seaboard makes complete prevention difficult. We have exercised proper diligence, using war-ships as well as revenue-cutters, and have made the business highly dangerous and uncertain. More cannot be asked. As for the debates in Congress, they are supposed to be domestic and privileged communications, not officially known outside. The unpleasant language may be vulgar and indecorous, without being properly the object of foreign complaint. Or, to put the distinction as clearly as possible, if the United States government fulfils its neutral duties, no indemnity can be col-

lected from it, no matter what the expressions of its legislators have been. And in fact, if every abusive characterization of a foreign government in our halls of Congress were to be noticed and resented by its object, we should be in water at least tepid most of the time. Rarely these abusive expressions come home to roost, as when a former senator from New England had packed his bag and was setting forth as minister to China, when he learned that he was *persona non grata* and must lose his job, all on account of some very natural and commendable anti-heathen sentiments which he had expressed and forgotten long since.

Now, if the position taken and the arguments advanced are sound, this country had a legitimate reason for insisting upon the pacification of Cuba, and was justified in taking steps to secure it. That means intervention of some kind. Yet it by no means followed that war was necessary, or at least immediate. This President McKinley realized. His attempt to get what he wanted through diplomacy met the approval of all truly patriotic men. Spain made concessions, brought in a new scheme of autonomy, and asked time to show its efficacy. It can be shown, I think, that the form of government offered was not as liberal as that which the English colonies enjoy. It

was not to regulate its own commercial intercourse with other countries, nor to be free from the sovereign's veto. But apart from this, there were two reasons why it could not succeed: first, because the good faith of the Spanish government in offering it was distrusted upon historical grounds; and, second, because the insurgents would have independence or nothing. So long as the insurrection continued, the problem remained unsolved. Yet, on the chance that the liberal government in Spain might manage to yield all that this country could fairly demand, all but the nominal sovereignty of the island, Mr. McKinley stuck manfully to his negotiations. The *Maine* explosion forced his hand. Whether we confess it or not, illogical or not, it was the fact of that catastrophe, working upon the passions of the great body of the people, which made peace no longer practicable. Not that self-restraint was thrown away. I wonder what other people would have awaited so patiently an official and technical report of such tremendous import. Suppose, after the German Kaiser had stirred England to its center by putting his finger into the Transvaal mess, an English ship of war had been sunk in Kiel or Bremen harbor by an explosion apparently from an outside source. Is it probable that the delicate balance of respon-

sibility for the loss, with a financial indemnity tacked on, would have been calmly argued or arbitrated, and national passion choked down? I trow not. Yet, legally speaking, such was our proper course. For neither could the Spanish government be held to have guaranteed the *Maine's* safety, on the one hand, nor to be free from all responsibility, except for the authorized acts of her officers, on the other. So that the nice adjustment of liability for an event which might be the result of negligence in policing the harbor of Havana, or a deliberate act of the authorities, or an accident, was really possible only through the judgment of disinterested parties. To pursue the righteous object, the pacification of Cuba, as an unconnected matter, and by further diplomacy; to arbitrate the liability for the loss of the *Maine*—that would have been the ideal, the logical course. But there are moments in the life of nations, as well as of individuals, when logic does not point the road. The youth of to-day, like his savage ancestor centuries ago, chooses his mate when the supreme passion flames up in his breast, and considerations of fortune and position are forgotten. The man vindicates his rights when his blood is up, and pays a five-hundred-dollar fee to recover a five-dollar claim. The nation, stirred be-

yond endurance, throwing logic and economy to the winds, interprets its duty to suit its passion, and rushes into war.

It may not be in accordance with the law of love, but since the dawn of history it has been the characteristic of our fallen human nature. And statesmen have to take account of it, as well as of budgets and balances. So the time came when our President, though himself still inclined to the peaceable way, and though the armistice offered to the insurgents invited further delay and negotiation, no longer struggled against the rising tide. He had sought a lawful object in a proper way, until circumstances were too strong. We should honor him for what he did, rather than blame him for what he could not do.

And when we study the conditions in Spain, we can understand why the American demands involved an impossibility. For ignorance of the real character and resources of this country, backed by invincible pride, would have unseated both the ministry and the dynasty which offended them. So that it is probable that endless negotiation would never have brought Sagasta and the queen regent to an admission of Cuban independence.

I do not declare, in this review of the events of the past year, that the right of the

United States to undertake armed intervention in Cuba is proved, nor that its policy in doing so is flawless. But I do believe that this intervention is as justifiable as any has ever been in the past, and is undertaken from as correct motives. And though the policy of war with Spain is open to criticism, I am inclined to think that it must have come to that in the end.

It was curious, when the supreme moment came, to see how regard for facts and precedents still governed. Though determining upon the independence of Cuba, Congress nevertheless did not recognize the independence of the insurgent body which stood for free Cuba. Into its motives we need not look too deeply, but it is something that it has not violated its own precedents nor the law of common sense, even as a war measure. Yet it must be said that such a step might have added weight to our disclaimer of all wish to possess Cuba, by pointing out the party which should possess it. Far better will it be, if we have the power, to call upon all the citizens of the liberated island, Spanish- and Cuban-born alike, to join in framing the new order.

But this is looking too far ahead, and crossing a bridge before we come to it. Meanwhile we have war on our hands. There has never been a moment's doubt as

to its eventual outcome. As has been well said, it is money at three per cent. against money at twelve per cent.; for a nation's credit is the weapon of first importance. With a determined and united people, and potential strength almost incalculable, the result must be certain; yet the early operations of an untested fleet might well be watched with some uneasiness. This the events at Manila have effectually dispelled.

But it is not the actual combat that it falls to me to discuss. The naval expert is studying this, with an eager curiosity which is changing week by week into confidence and enthusiasm, as his theories are confirmed by results of an astonishing character. Our attention is rather to be directed to the effect of this war upon commerce. There were two reasons for doubting whether the old rules of capture, in all their harshness and completeness, would be applied. One was the growth of the neutral influence and interest; the second related to the change in modern commercial usages.

When the first armed neutrality—a league principally made up of the Baltic powers—announced as part of its program the rule that free ships make free goods, it marked an epoch. For the neutrals thus showed their intention to combine to advance their interests, even by force and in violation of

the accepted law. It was the first conspicuous proof of the neutral's consciousness of his own importance. And throughout the century now ending, the neutral influence has grown. When it cannot prevent war altogether, it can limit its disastrous effects upon trade. It must not be thought that any neutral, and least of all Great Britain, would disregard the primary rules governing blockade and contraband and the right of search. If for no other reason, he could not afford to lay down so hampering a precedent. But we could fairly expect to find, in the interpretation of treaties, in the powers' attitude toward privateering, in their dislike to submit to search, in their desire that the postal service shall be undisturbed, in their resistance to frivolous capture, a strong and united neutral intention to make their trade as free from belligerent interruption as possible. And this may possibly go the length of offering mediation on the basis of Cuban independence, after a Spanish reverse or two has given the opening.

Quite as influential in limiting the belligerents' right of capture is modern trade usage.

Once upon a time the merchant loaded his grain or his goods upon his own or another's ship, and sent them to find a market;

or, if shipped upon order, yet the title did not pass, the payment was not made, until delivery. Traces of this, of course, survive; but the prevalent usage to-day completes the sale of produce before shipment. American grain and cotton for English use are paid for by accepted bill of exchange, and their new ownership attaches to them while still in this country. And so the result, in very many cases, must be that Spain will find no enemy's property afloat to capture. I was curious to know how the Spanish government and prize courts would meet this difficulty. For where the produce of American soil, presumptively American property, screened itself from capture under a bill of sale which might or might not be genuine, it would have been but natural to stretch a point and at least subject the question to judicial investigation. If this should result in acquitting the goods, it would at least have delayed them, perhaps for months, and have cost the ship heavily. This in turn was likely to be resented by the neutral.

But all such speculations have been set at rest by the early announcements of both combatants that they will be governed by the rules of the declaration of Paris of 1856, though Spain reserved the right to issue letters of marque. It will be recalled that the declaration provided for the abolition

of privateering, for effective blockades, and for the security of neutral goods under an enemy's flag and enemy's goods under the neutral flag. It bound only its signatories, of whom Spain was not one. By adopting its rules, Spain thus gave up her undoubted right to seize the goods and the produce of the United States loaded on board English, German, Dutch, and French ships.

I believe it is not extravagant to say that this was a deliberate surrender by Spain of her very best means of distressing her enemy. In spite of all the newspaper talk of coast attack, the likelihood of it has been small. It is too far from a Spanish base, it risked too much from a fleet attack in flank, it promised no adequate return, and unless the town shot at was fortified and defended the attack would be unlawful. No landing in force was practicable, nor had the United States colonies to be attacked. There remained, therefore, only fleet combat or the war upon commerce. This last was legal and practicable, both as against American ships and American goods in neutral ships. Nothing in the treaties between Spain and the United States forbade it; nothing in the law of nations even discouraged it. Ships of war are built especially for it, as commerce-destroyers; it is the sole object of privateering, a right which we ourselves, in company

with Spain, have for forty years resolutely held fast to. And the attack upon American commerce, or rather upon the marketing of American products, had the possibility of much mischief. Cutting off the coast trade was perhaps possible, but would not be so safe and easy as a patrol of the Channel entrance, and the seizure of American-owned goods borne mostly by the neutral. For whatever interfered with the regularity of a voyage increased its cost in insurance and freights, and diminished correspondingly the value of its lading. This meant dearer wheat abroad, cheaper wheat in the West. It might even mean a considerable dislocation of our railway and terminal through system, substituting Canadian ports for New York and Baltimore, Philadelphia and Boston, in order to escape the suspicion of carrying enemy's goods. And the result might have been Western discontent, and opposition to the war. How, then, are we to account for the surrender by Spain of the chief weapon in her armory? The explanation must be found in the two facts which have been alluded to, the change in trade usage and the neutral influence. May we not imagine the neutral powers saying to Spain: "Defend your honor and your island, if it must be, but see to it that our commerce is damaged as little as possible"?

In our own action there is less to occasion surprise. Every one of the rules of the declaration of Paris except privateering has been advocated by the executive for many years, and inserted in many treaties. Privateering to-day is an anachronism. It would not be profitable or practicable. Ships of war can do the same work better. But apart from such considerations, the United States had a definite object to work for, the expulsion of the Spanish from Cuba. Preying upon Spanish commerce, except as it interfered with a plan of campaign; distressing our enemy, and incidentally the neutral, by seizing Spanish goods under the neutral flag—these were so unessential to our main object as to be unimportant. We had weapons better forged, while Spain had none.

This, then, is the principal feature of the war thus far, that neither combatant means to seize enemy's goods in neutral bottoms. More than this, it is a marked step in the history of naval capture; it is the virtual accession to the declaration of Paris of two out of the three states refusing in 1856 to sign that instrument. It should be followed by their formal accession in happier times.

Two or three minor questions have been raised, or at least suggested, by the war thus far, which may not be without interest. One

relates to a declaration of war. Was it necessary, to legalize captures?

The international rule is that war legally dates from the actual outbreak of hostilities. Now the capture of enemy's property is a mark of the outbreak of hostilities, and the inference is that the seizure of the other party's property creates a status which legalizes an act otherwise doubtful. Thus the argument is that war exists because a capture has been made, and a capture is legal because war exists, which sounds rather sophistical. Yet formal declarations of war are neither necessary nor usual to-day. Strained relations lead to a specific demand of some sort, with an ultimatum or threat attached. Failure to comply with the terms of this ultimatum means war. So, too, a legislative act to authorize war is construed as a declaration. But though no formal announcement of war is due to an enemy, it is customary to the neutral to let him know what rules of capture likely to affect his interests are to be enforced. And this, as we have seen, has been made. Congress voted a formal declaration, too, apparently for domestic reasons. And by proclamation the President has given the customary grace to Spanish ships in our ports or bound hither before war began. But this is not in terms made retroactive. I should imagine, then,

that the only question will arise in the case of the captures of the first few days; that the legality of such captures is a proper question for a prize court; and that the chance is that it will be sustained. Unless special reasons exist, coast fishermen should be exempt from capture, in conformity to modern usage. The same rule, it may be added, holds good as to scientific expeditions.

No serious questions affecting the blockade of the westerly Cuban ports have as yet arisen. By courtesy one or two neutral men-of-war have been passed through it. One warning, at the harbor's mouth, has been given to merchantmen sailing before the notice and the fact became notorious. But very soon every vessel trying to enter will be good prize.

We have pledged ourselves to make this blockade effective. By this is meant that it shall be highly dangerous, not that it shall be actually prohibitory. If the blockading squadron is driven away temporarily by stress of weather, no new notice is due; but if by the Spanish fleet, the blockade must begin again *de novo*.

In our treaties with various countries, now neutrals, contraband goods are specified. But although it is only fair to the neutral that he should know accurately and in ad-

vance what kinds of property he may lawfully carry, it is equally true that these lists of contraband, many of them antiquated, can be enlarged to keep pace with the adaptation of new materials or combinations to warlike uses. It will be proper, therefore, for our own government to draw up a full list of articles which it will consider contraband, and submit it to the neutral powers. Coal has a doubtful character. Under certain circumstances it has as direct a relation to war as gunpowder itself; under others it merely serves manufactures and commerce. Thus there is no uniformity of treatment. In the present war the British government considers it contraband. This announcement is supplemented by a rule, identical, I believe, with that followed by it in the Civil War, which allows its sale at British coaling-ports to ships of war of both combatants alike, in limited quantities and infrequently. Gunpowder could not be similarly sold, without a breach of neutrality. As contraband, traffic in coal is lawful, of course, but subject to the liability of capture. The port regulations concerning it are fair, and will help that nation's vessel most which happens to be farthest from its home base of supplies.

The United States is committed by its past usage to the English doctrine ranking

coal "occasionally contraband." But the continental view is not in line with this, nor, indeed, uniform itself. France holds directly the contrary; so does Russia; while Germany goes even further than England. As for Italy, her treaty with the United States in 1871 does not mention coal as contraband, yet declares that the articles enumerated, "and no others, shall be considered as comprehended under this denomination." Clearly there is room in this direction for differences, since both France and Italy are partial to Spain, and will be likely to defend their theory that coal is *not* contraband.

It may have been noticed that Spain is said to have terminated her treaties with the United States of America. War in itself would have done this. But it cannot be intended that a provision to take effect only in case of war should be abrogated by war, for that would be a denial of its existence *ab initio* and altogether.

There is one such proviso, in Article XIII, treaty of 1795, which grants a year, in case of war, for the subjects of either country, within the other, to withdraw with their property. So that if Spain should expel all Americans within this time-limit, it would be in violation of contract; and if injury is done them, satisfaction must be made by the government.

As to the right of search, it may not be clear to every one that any ship may be stopped and searched on the high seas. For she may be carrying contraband to a hostile destination, or she may be bound for a blockaded port. And, as Lord Stowell said, you may search her, no matter what her character, destination, and cargo; for until you have searched her, you cannot certainly tell what her character, destination, and cargo are. Moreover, capture may be justified at the very outset of the voyage, if circumstances make the ship's destination clear. Mail-steamers, however, are to be regarded with great leniency, and if the usage of our Civil War is followed, if disturbed at all, their mails should be forwarded with seals unbroken.

There are certain other consequences of war, which may not be familiar, nor widely applicable, yet are likely to raise a question. I mean the personal results which flow from the hostility of the two countries. By our law every subject of the one state is at war with every subject of the other. In theory all Spanish property within the United States may be confiscated, but the courts say that there must be a special act of legislation to do it, and such a barbarity would be abhorrent to the modern mind. What does happen is this: All partnerships are

dissolved. All contracts, including insurance policies, are suspended. Debts are uncollectable during war, but revive at the return of peace. Each state considers as its enemy's subjects not only those born and naturalized such, but also foreigners resident within its jurisdiction for any purpose. Thus Germans and their property injured by a bombardment of Manila would have no claim to indemnity. So, also, the property of an English wine-merchant resident in Xeres would be subject to capture. In fact, the same is true of an American's share in the same house. No trading with Spain on the part of any one in the United States is permissible, and "trading" is a wide term. In case of a partnership house on neutral soil the law is curious and inconsistent. Suppose such a house in France with three partners, an American, a Frenchman, a Spaniard. We should not enforce the prohibition to trade with an enemy against the American's share, but we would capture and condemn the Spaniard's share. And so on in great detail.

One more inquiry, which is likely to be a practical one. Suppose Manila and Porto Rico to be captured and occupied by our forces. The usual rules for the government of occupied territory would presumably be put in force. These are practically the local

laws and usages, under the local authorities and judges, but sanctioned and backed by martial law. Occupation does not vest sovereignty in the occupant. Sovereignty is in suspense, as it were, until decided by the terms of peace. Such is the general scheme. But at Manila what duties would we levy, and for whose benefit would they be spent? We have a precedent to guide us on this point, which may be found in two decisions of the Supreme Court, the cases arising during the Mexican War (*Fleming vs. Page*, 9 Howard, 603; *Cross vs. Harrison*, 16 Howard, 164). The law is well stated by Dana in his edition of Wheaton (note 162, p. 421), from which I quote: "During the Mexican War, certain ports of the country, which were in the firm possession of the United States forces, were decided not to be ports of the United States in such sense that the ordinary revenue laws established for the Union would take effect there, but were places held by the nation for a special purpose of war,—whether to be permanently held or not being matter of future determination,—and subject, while so held, to such special revenue regulations as the proper department of the government should establish. In the absence of any provisions by Congress for such cases, the President, as commander-in-chief, had authority to pre-

scribe them. As regards goods imported into the United States from a place so held, they are to be considered as importations from a foreign country." Mr. Dana also cites the case of Castine, held by a British force during the War of 1812. Our Supreme Court denied that it could be considered a part of the United States during such occupation, within the meaning of the revenue laws, or that duties upon goods then imported could be afterward collected.

If we occupy Manila, then, the Dingley tariff is not *ipso facto* applicable, though legislation could make it so. The probability is, however, following modern usage, that the Spanish tariff would be enforced, and the proceeds, with the other taxes, be used for the administration of the islands. It would be legal to cover a balance into our treasury—legal, but highly impolitic, for it is just that same sort of administration which is costing Spain her colonies. Dana wrote thirty years ago. The theory, perhaps, has not changed since then, but the usage has become everywhere recognized that occupied territory does not belong to the temporary conqueror. His will is its law, it is true, but its law expressed in the language of the law already existing; he collects taxes, but through the usual local agencies, if they

are available, and for the local benefit; he is trustee, in short, not bandit.

These are some of the legal questions raised by the war, set forth, I fear, in but a dull and fragmentary way. Others are coming. The State Department seems fully equal to them. There is a wider, a more serious problem, however, which the people, and not a department, must solve, deliberately, wisely, counting the cost. If the result of the war is to leave the United States in possession of various Spanish colonies, what shall be done with them? The pressure to retain them will be strong, as coaling-stations, as indemnity, as an act of humanity giving refuge to the victims of Spanish misrule, as an act of policy launching this country upon a new career. With Hawaii annexed, with Porto Rico and the Philippines conquered, with coaling-stations galore, with a Nicaragua Canal, a navy suited to our ambitions and resources, an army large enough for foreign service, and a civil service adapted to colonial use, we should be ready to pose as a world power, though rather late in the field. It is a brilliant program; is it a wise one? Will these new activities help in the solution of the old problems—a stable currency, a compromise tariff, a reformed public service? Is it the true mission of a people which is working

out the problem of self-government to run off into colonial aggrandizement? To me the prospect is not reassuring. We seem to have come to the parting of the ways. There need be no superstitious reverence for the policy of our early days, as outlined in the noble words of Washington's farewell address. What we must judge of is the best and wisest and safest policy for to-day. Whether this is to be forward and aggressive, or devoted to internal development and conservative, every citizen must decide for himself. If he wishes an election to turn on the claim to a slice of China, or the support of a candidate for the presidency in Mexico, our demagogues will not deny him. Nothing could be more convenient for the dodging of troublesome issues; nothing more alluring than to play on the pseudo-patriotic chord. There is danger in our strength; we should beware even of our nobler aspirations. The plainest of common sense is a better guide than the fervor of sentimentalism or the ambition of the Jingoës. Of one thing, however, let us make sure: that our future shall be determined *by* us and not *for* us. Our isolation allows us independent action. And if a German emperor or a French president attempts to limit, to threaten, or to dictate, he shall know that we are no part of his system, that our sense of right, not his will, is our law.

THE FUTURE OF THE PHILIPPINES

THE NEW YORK TIMES,
MAY 30, 1898

THE FUTURE OF THE PHILIPPINES

ONE of the marked characteristics of the American people is its cheerful optimism. Too keen to hide from itself its blunders, it is nevertheless too hopeful to dwell long upon their harmfulness, and, it must be confessed, too impatient to be guided always by the lessons of experience. This is a sign of youth and of strength. It betokens a nation accustomed to command success.

There is an example of this optimism at the present time. We command the harbor of Manila, but have not occupied the Philippines. This is a serious and a separate task. We have sailed into the port of San Juan in Porto Rico, have knocked down a portion of the fortifications, and have sailed out again. What the sequence of these two actions will be we cannot know. But we guess it, and begin to discuss the future of both islands as if we held them in the hollow of our hands. Truly Columbia is the milk-maid of the fable.

In accordance with this national characteristic, and disregarding the fate of the milkmaid and her fairing, let us consider what the policy of the United States should be if the close of the war with Spain finds the Philippines in its possession.

There are three—yes, four—interests to be kept in sight. These appertain to the former sovereign, to the inhabitants themselves, to the other trading powers whose commercial and political balance may be affected, and to the United States.

1. The rights of Spain.

Military occupation does not wipe out the sovereignty of an invaded territory. That sovereignty may be incapable of assertion, yet it survives until either revived or removed by a treaty of peace. Spain will thus retain rights, even in case of complete conquest, which must be eventually weighed and adjusted. What line this will take must depend upon the influence of other powers, upon our own sense of expediency, and upon the fortune of war in other directions.

2. The rights of the Philippine islanders.

It would be unwarranted to say that no cession of these islands would be legitimate unless ratified by the wishes of their inhabitants. In a highly civilized community this is the modern tendency, though even then yielding to political exigencies, as in Alsace-

Lorraine. But it is a practical question whether the Philippines could be anything but a burden to this country if their transfer proved to be against the will of their millions of inhabitants, many already in revolt, and absolutely foreign to our blood, our usages, our laws, our ideals.

3. The interests of other powers.

Here the vital question is how far the United States, by possession of the Philippines, would place itself within the European vortex, to be buffeted and cajoled, thwarted and urged on, forced out from its safe and comfortable isolation into the treacherous sea of enmities and alliances. When Japan made peace with China at Simonoseki she received a slice of the mainland. Russia, France, and Germany combined to prevent this cession, and Japan had to content herself with an indemnity and Formosa. When we begin to trench upon the trading preserves of the great military powers, shall we be similarly treated? Would we submit to such treatment?

4. The rights and true interests of the United States.

The right of conquest is something. The consciousness of bringing a better government is something. The prospect of a favorable vantage-ground for the extension of our Oriental trade is a temptation. But

the problem is terribly complex. Here are some of the considerations to be kept in mind while we are trying to solve it:

We are waging a war which we believe to be just. It is in defense of humanity and of our sorely tried national interests. Its object is the pacification of Cuba. The entire civilized world save Great Britain believes that it is a war of selfish aggression. We declare that our motives are pure, and enact in the most formal way a self-denying ordinance to assure the world that we shall not retain Cuba. If under these circumstances we do seize and propose to retain, not Cuba at once, perhaps, but Porto Rico and the Philippines, one or both, with what face can we maintain our altruistic professions? In appearance and in fact we should be hypocrites.

But can we part with our prospective conquests? Too weak to stand alone as they are, we could not add them to the number of bastard republics. Nor could we give them or sell them to this power and to that, lest all the slighted powers should resent it, and demand an equivalent. The most-favored-nation clause and the balance-of-power principle seem to run singularly close together. Yet to hand them back to Spain, no matter on what condition, would be a deliberate surrender of their peoples to the

grinding tyranny from which, at great cost, we have rescued their Cuban brothers. Are we not, then, by process of exclusion, forced to accept as our own what the fortune of war may give us, even if it be a white elephant? Possibly. There must be a balancing of considerations. Unless we do retain our conquests, however, the line of least resistance would seem to lead to Spanish ownership again.

What are the objections to the retention by the United States of the Philippines as a future part of its territory? Are they practical and sound, or are they chiefly ethical, like the one already given?

One relates to the form of government which could be applied to them. Our conquests hitherto, as well as our purchases, New Mexico and California, as well as Louisiana and Alaska, have brought us territory barely inhabited at all. But here are thickly populated islands, whose people are so mixed in race, so uncertain in quality of civilization, so destitute to all appearance in self-governing capacity, as to make it doubtful whether they could ever be brought into our Union as an integral part. For the present, at least, they must be governed with a strong hand. This might mean indefinite martial law; it might mean government by a commission or a governor appointed by the

President, relying upon a military force for support. Either method might succeed temporarily, though either method is liable to abuse. But neither offers a permanent solution. The satrap system is too repugnant to our political ideas. Nor can we confide in the selection of officials to man such a system until our civil service is better developed.

Another objection is to be found in the military burden involved. Some effort is necessary to picture to ourselves the change of military and naval establishment which would be necessary if the United States became a colonial power. This sort of ambition grows by what it feeds upon. Porto Rico, Hawaii, the Philippines, would only whet, not satisfy, the taste. We should require a foothold in China to compete in trade facilities with other powers. We should insist upon the exclusive control of a Central American interoceanic canal. Indeed, many urge this at present, looking at the question from the theoretical and strategical, not the practical, point of view. We should need Cuba as the key to the eastern approach to this canal. We should need coaling-stations and dry-docks—in other words, fortified and garrisoned ports—at convenient points in the Pacific and South Atlantic. All this means more territory to defend, more soldiers to defend with, more

ships to keep up the connection—not only more, but very many more. How gladly Britain would limit her responsibilities if she could! But it would be construed as a sign of weakness, and she fears the consequences. She cannot let go. We are more fortunate because we have not taken hold. We are a rich and prosperous people. This is largely owing to two causes (aside from race and form of government), cheap land and freedom from militarism. Just as the cheap government land is becoming a thing of the past, and men are wondering whether they can grow wheat at a profit and fertilize also, we are asked to assume the military burden.

One other objection to a national policy which must involve large expenditures, closer political relations with other powers, and trade rivalries reaching to the ends of the earth, relates to its effect upon domestic problems. We have several questions upon which national parties divide—a stable currency, a compromise tariff, and reform in various departments of national, State, and municipal politics. These must be settled soon and wisely, as many believe, if this republic is successfully to endure. But how can they be properly settled or advantageously considered if burning questions of foreign policy are complicated with them?

Take, for instance, the one hundred and fifty or two hundred millions of additional income which this policy of colonial expansion would require, or the much larger sum needed in case of actual war. (For war would be more likely than at present, just as a man is more likely to injure another if he has a weapon than if he has none.) To raise such revenue involves a dozen considerations like these: a national debt, issuing paper money, abolition of pension payments, lowering tariffs to make them more productive, an income tax, heavier internal taxation.

Is it not likely that currency reform and sound tariff legislation would be very much interfered with, if not altogether prevented, by the financial necessities of a colonial policy? While, on the other hand, the financial advantages of that policy, through extension of trade and finding new markets, can add but indirectly and insignificantly to the national income; for the colonial requirements must first be met, otherwise our administration would be no better than Spain's. The fact is that the advocates of a colonial policy are carried away by the success of Great Britain in this direction, as Germany has been, forgetting that English development has been the result of geographical isolation and centuries of effort.

Without wasting rhetoric, these are matters to be seriously weighed before we decide to keep the Philippines—if we shall find ourselves their masters. And, for one, I am inclined to think that if, before the war is fought to a final issue, peace should be restored, whether through mediation or Spanish initiative, on the basis of Cuban independence and a restoration of Manila, it would be a happy escape from a most perplexing situation.

THE LAW AND THE POLICY
FOR HAWAII

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THE LAW AND THE POLICY FOR HAWAII

FOR more than two generations the history of the minor states on this continent has been kaleidoscopic. Revolution has followed revolution, monarchy has followed republic, and republic monarchy; while all too frequently from a congenial soil has sprung that poisonous growth, the dictator. It is not safe to draw too broad conclusions hastily, and certain exceptions occur to every one. But, on the whole, the chaotic politics of Central and South America lead one to question the genius of the Latin races for self-government; they go far to prove that no magical potency lies in a republican form of government. It is human character, not political form, that tells in the stability of institutions. An incidental result of these frequent political changes has been to oblige the United States accurately to define its diplomatic position in view of them, and to lay down rules for the recognition of new

governments. Its usage in this regard may be considered settled. It is clearly stated in a despatch of Mr. Livingston's, Secretary of State, to Sir Charles Vaughan, April 30, 1833: "It has been the principle and the invariable practice of the United States to recognize that as the legal government of another nation which by its establishment in the actual exercise of political power might be supposed to have received the express or implied assent of [the] people."

To show the application of this principle to revolutionary changes similar to the recent overturn in Hawaii, several examples are selected from recent state papers. In his third annual message (1883), referring to the contest just terminated between Bolivia, Chile, and Peru, President Arthur concludes: "When the will of the Peruvian people shall be manifested, I shall not hesitate to recognize the government approved by them." And, again, Mr. Frelinghuysen, in a despatch to Mr. Logan, March 17, 1884, declares: "The Department of State will not recognize a revolutionary government claiming to represent the people in a South American state until it is established by a free expression of the will of that people." Similarly, President Hayes states (first annual message, 1877): "It has been the custom of the United States, when such [revolutionary] changes of gov-

ernment have heretofore occurred in Mexico, to recognize and enter into official relations with the *de facto* government as soon as it shall appear to have the approval of the Mexican people, and should manifest a disposition to adhere to the obligations of treaties and international friendship." A single instance more, Mr. Seward to Mr. Culver, November 19, 1862, in the matter of Venezuela: "A revolutionary government is not to be recognized until it is established by the great body of the population of the state it claims to govern."

This rule represents not only the usage of this country in the matter of recognition; it is also in accord with the principles of international law. All states are equal. Each state may determine its own form of government, may change it at will. The government *de facto* is the government *de jure*. That is a government *de facto* which is capable of insisting on the rights and fulfilling the duties of the state. Such capacity will spring from the undoubted expression of the will of the people. Recognition, before proof of such popular backing is furnished, is premature. It assumes a fact which is not yet manifest.

With these simple, well-established rules in mind, we are in a position to judge of the propriety of the early diplomatic moves

in the Hawaiian question now confronting us. The position of a queen in the Hawaiian Islands is as legal as that of an emperor in Russia. The personal character of that queen does not affect the legality of her government. A change of the constitution under which she governs is an internal question solely. Early in the present year there occurred a revolutionary outbreak in Honolulu. A new government was set up, calling itself provisional. What was the attitude of the United States toward it? Was its traditional usage observed? On the contrary, amid the conflicting statements of fact, we can at least make sure of this: before the people of Oahu had a chance to pronounce upon their desire for the change, before the other islands could even hear of it, before the new régime could demonstrate its capacity for fulfilling the obligations of the state, before it had gained possession of all the government buildings and proved its power, its recognition was granted by the United States. This action was premature; it was contrary to our usage in similar cases; it was in the highest degree improper. That it was soon followed by similar recognition by the representatives of the other states which maintain diplomatic relations with Hawaii does not excuse it. For, in the first place, our recognition unquestionably gave

the new government a standing which it might not otherwise have had, and, again, recognition by one state is apt to be speedily followed by the recognition of other states, lest they suffer in influence with the new government. Emphatically it is the first step which counts. It will be noticed that no mention is made of the charge that the avowed sympathies of the United States minister, and the landing of marines, nominally to preserve order, assisted in effecting this revolution. For the latter act there was a precedent at the time of the accession of King Kalakaua. Moreover, the troops had orders to take no part in the contest, but merely to protect property. Into the questions of veracity raised by Mr. Blount's report and Mr. Stevens's denials, as well as into the question of motive in landing marines, for the purposes of the present argument it is not necessary to go. The hasty recognition of the provisional government by the United States was wrong. If it was the sequel of a conspiracy hatched by Mr. Stevens, it could be no more than wrong—more scandalous, it is true, but in nature similar. This closes the first act in the little drama.

The second act is now on the stage. Here we find a sovereign and independent state, calling itself a provisional government, that

is, organized provisionally to secure certain objects. What these objects were is best stated in the proclamation of the revolutionary committee, issued January 16, 1893: "The Hawaiian monarchical system of government is hereby abrogated. Provisional government for the control and management of public affairs and the protection of public peace is hereby established, to exist until terms of union with the United States of America have been negotiated and agreed upon." What is the status of this government in the eye of international law? Does its provisional character make it any the less a sovereign state? Granting that its origin was owing to a wrongful act on the part of the United States, is its subsequent legality impaired? Both of these questions must be answered in the negative. The intervention of France in our Revolutionary War was technically illegal, was an act of war, but the recognition of the United States was not thereby invalidated. Our recognition of Texan independence was wrong, in being likewise premature, but no one questioned the legality of the Texan status. Not only our recognition of the new government in Hawaii, not only its recognition by other states, but also every subsequent act, proves its sovereignty. We have accredited a minister to it, we have received a minister

from it. Nor does its avowed provisional character alter our duties or its rights. If a government is organized to secure certain objects, who shall decide when and whether those objects are achieved or are impossible, or what other objects shall succeed them? Is the dictum that the objects for which this provisional government was formed have proved nugatory, and that, therefore, *ipso facto* it has lapsed, and the former government reverts, one which it is competent for any other than itself to pronounce? Surely not, otherwise its sovereignty would be a very qualified article. What this new government shall do with its own, what it shall develop into, whether it shall withdraw in favor of the deposed queen or form itself into a permanent republic, is a matter purely for internal decision.

The recognition of a provisional government is no new thing. It was made in the case of Costa Rica in 1868. The "National Defense Committee" was recognized in 1870 as the government of France. The Calderon government was recognized in 1881 as the "existing provisional government" of Peru.

When we ask, then, what should be our attitude toward the provisional government of Hawaii, if we observe our own usage and the rules of international law, there can be but one answer. Its rights are the same,

our relations to it are the same, as in the case of its predecessor. To restore the queen by intervention would be a fresh wrong. Any forcible interference in the affairs of Hawaii, even to insist on a plebiscite whose result should determine in whose hands the government shall reside, would be illegal. For Hawaii is a sovereign state. One wrong cannot be cured by another. Our duty is simple. It consists in keeping our hands off.

In international relations, questions of policy must be argued on different lines from questions of law. While the law is or should be simple, capable of precise statement, a nation's policy is the result of a complexity of motives, of facts which of necessity may not have been brought clearly into view. To attempt to define the proper policy for the United States to pursue toward Hawaii, then, is to tread on more uncertain ground. Yet even here we have a former usage to guide us; to change this should require justification.

In a despatch of Mr. Webster's, December 19, 1842, our policy toward Hawaii was stated as follows: "The United States have regarded the existing authorities in the Sandwich Islands as a government suited to the condition of the people and resting on their own choice; and the Presi-

dent is of opinion that the interests of all commercial nations require that that government should not be interfered with by foreign powers. Of the vessels which visit the islands, it is known that the great majority belong to the United States. The United States, therefore, are more interested in the fate of the islands and their government than any other nation can be, and this consideration induces the President to be quite willing to declare, as the sense of the government of the United States, that the government of the Sandwich Islands ought to be respected; that no power ought either to take possession of the islands as a conquest or for the purpose of colonization, and that no power ought to seek for any undue control over the existing government, or any exclusive privileges or preferences with it in matters of commerce."

In his message a few days later President Tyler deemed it "not unfit to make the declaration that [this] government seeks no peculiar advantages, no exclusive control over the Hawaiian government, but is content with its independent existence, and anxiously wishes for its security and prosperity."

Developing this idea, Mr. Legaré wrote Mr. Everett, in 1843, to the effect that the Hawaiian Islands bore such peculiar rela-

tions to ourselves that we might even feel justified, consistently with our principles, in interfering by force to prevent their falling (by conquest) into the hands of one of the great powers of Europe. And in 1850, suspecting French designs upon the Sandwich Islands, Mr. Clayton wrote that their situation and "the bonds, commercial and of other descriptions, between them and the United States are such that we could never with indifference allow them to pass under the dominion or exclusive control of any other power. We do not ourselves court sovereignty over them."

The following year Mr. Webster reiterated the same policy in an admirable despatch, disclaiming the desire "to exert any sinister influence over the councils of Hawaii," and expecting "to see other powerful nations act in the same spirit." "This government still desires to see the nationality of the Hawaiian government maintained, its independent administration of public affairs respected, and its prosperity and reputation increased." This was after an intrigue of the French commissioner in Hawaiian affairs had come to light. With a single exception, all our state papers alluding to this topic, the messages of our presidents, the despatches of our secretaries of state, bear witness to the same policy of independence

for Hawaii, an independence free from the interference of foreign states, uncontrolled by our own.

This one exception is a despatch of Mr. Marcy in 1853. In September he had written: "While we do not intend to attempt the exercise of any exclusive control over them, we are resolved that no other power or state shall exact any political or commercial privileges from them which we are not permitted to enjoy, far less to establish any protectorate over them."

But by December he seems to have changed his mind, and writes: "I do not think the present Hawaiian government can long remain in the hands of the present rulers, or under the control of the native inhabitants of these islands, and both England and France are apprised of our determination not to allow them to be owned by or to fall under the protection of these powers or of any other European nation. It seems to be inevitable that they must come under the control of this government, and it would be but reasonable and fair that these powers should acquiesce in such a disposition of them, provided the transference was effected by fair means." This was but a passing idea, of which nothing came, and in 1868 Mr. Seward wrote that "the public mind in the United States was not in a condition to

entertain the question of the annexation of the Sandwich Islands." Mr. Blaine's published correspondence conveys repeatedly the same impressions.

This practically uniform policy toward Hawaii—jealousy of its possible control by some other power, while not seeking to alter its independent status ourselves—appears in the reciprocity treaty of 1875. After arranging for the free interchange of certain specified products by the two countries, Article IV stipulates as follows: "It is agreed on the part of his Hawaiian Majesty, that, so long as this treaty shall remain in force, he will not lease or otherwise dispose of or create any lien upon any port, harbor, or other territory in his dominions, or grant any special privilege or rights of use therein, to any other power, state, or government, nor make any treaty by which any other nation shall obtain the same privileges, relative to the admission of any articles free of duty, hereby secured to the United States."

Bearing in mind the policy thus described and witnessed to, we are ready to ask if there is anything in the present situation in Hawaii to necessitate a reversal of this policy.

The population of the Hawaiian Islands has a very large foreign admixture, outnumbering the natives in the proportion of

three to two. This is chiefly Portuguese, but the wealth and trade are largely in the hands of the Americans. Through the efforts of American missionaries the island population was Christianized. Now sixty per cent. of its inhabitants attend church regularly, while ninety-five per cent. can read and write. Their government has been a constitutional monarchy. The foreign element showed its power in 1887 by forcing upon the crown a new constitution more favorable to itself. The queen, recently deposed, attempted the abolition of this constitution, but drew back before the storm which her action created. Distrusting her, and adverse to certain government measures relating to the opium traffic and the Louisiana lottery, the American element overthrew the queen, and set up a government of its own, with the avowed object of annexation to the United States. The annexation idea was acceptable to President Harrison, and a treaty to secure that object was signed. Before it was ratified by the Senate, however, came the change of administration and recall of the treaty.

Now, it is noteworthy that neither party in Hawaii seems hostile to the interests of this country. The recent queen referred her cause to this government; the revolutionary party desired the closest possible

connection with it. Moreover, both parties seem to promise reasonably well to observe the obligations of state toward the United States. The monarchy can show the education and peaceful temper of its native population, together with its fifty years' record of creditable national life and treaty observance. The provisional government represents, it is said, probably with truth, the wealth, intelligence, and enterprise of the foreign element. Whichever faction holds the mastery of affairs, there seems no menace to this country's interests. If those interests are threatened, we have the treaty of 1875 to fall back upon. If that treaty should be abrogated, we have a settled policy, in line with the Monroe Doctrine, to appeal to. The conclusion is irresistible that the trade relations between Hawaii and this country are so strong, the established policy of this country so well understood, that its interests are in no danger whatever.

Nor does the annexation of the Hawaiian Islands seem to promise great material advantage. Annexation of territory beyond sea is not looked upon with favor by our people. This was shown in the cases of Cuba and Santo Domingo. Already we have free commercial intercourse with Hawaii; nine tenths of its exports come to the United States; eight tenths of its imports are from

our shores. What profit would this country reap from annexation, commensurate with the responsibilities and burdens which it must assume? The real and only advantage from annexation would be gained by the islands themselves. In a question of state policy we must consider our own interests, not those of others.

If, then, our rights are not menaced, our self-interest not specially appealed to, why should we go counter to our established policy? There exists no sufficient reason. While fostering our trade relations in every legitimate way, both law and policy demand that we keep our hands off Hawaii.

AN INTEROCEANIC CANAL IN THE
LIGHT OF PRECEDENT

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AN INTEROCEANIC CANAL IN THE LIGHT OF PRECEDENT

SOONER or later, by private enterprise or by national aid, it is likely that some portion of the Central American isthmus will be crossed by a ship-canal joining the oceans. The vast importance of such a waterway to the world's commerce, its vast importance particularly in the development of the United States, needs no demonstration. To enable an interoceanic canal, however, to attain its highest usefulness; to make for it a sure passageway for the flags of all nations, unblocked in war, secure from the vicissitudes of semi-tropical politics; to use it as not abusing it—this is a problem which demands study and statesmanship.

To show, if it may be, that the neutralization of such a canal under the guaranty of the chief commercial powers is the status most in accordance with precedent and history and our own policy, is the object of these pages.

The international status of an interoceanic canal is a question of much perplexity, upon which the history of the past throws but a partial light. Such a canal is not a mere strait like the Dardanelles, the Danish Belts, or the channel of Magellan, naturally formed and indestructible. Exclusive jurisdiction over these waters as a matter of right has never been conceded by the United States, and their passage is now free to all nations.

On the other hand, it is, in theory at least, entirely subject to the sovereignty and control of the state within whose jurisdiction it lies. For example, the North Sea Canal in Germany, or, if constructed, the ship-canal across southwestern France from the Garonne to the Mediterranean, will be controlled by those countries alone. Other states may insist upon a commercial use on the footing of the most favored nation; but they cannot prevent an exclusive military use by the possessory government.

There is, however, a vital difference between such canals as these and the interoceanic variety, analogous though they are. The former are built, guarded, managed by agencies of their own nationality, all adequate to the purpose. The latter, in point of fact, must lack every one of these characteristics. No country through which an interoceanic canal has been proposed can

itself afford the capital for its construction. Its military and naval strength are inadequate for protection. Without sure protection, neither management nor construction would be practicable, for capital is timid. As compared with the simple status of the North Sea Canal, notice, therefore, the complex character of one across Panama or Nicaragua. The elements of complexity are three:

A weak state granting the concession, without capital or credit or military power.

A foreign construction company, dependent upon its chartering government for that security and permanence which are its very breath of life.

A treaty, between the givers of concession and of charter, which authorizes the work and grants to the chartering power the rights under which it acts. Here are limitations upon the jurisdiction of the sovereign on every hand—limitations, too, which may be capable of indefinite expansion under pressure. And this danger introduces a fourth element into the problem. No commercial state can afford, in justice to its own commerce, to permit that commerce in its use of such a canal to suffer any, even the least, discrimination against it. Nor will any one state permit another, save as the result of necessity, the military use of such a canal,

from which use it is itself debarred. Contrary as they are to the free, liberal, enlightened spirit of our time, such exclusive rights can only be the result of major force. Both the states in question, therefore, the one conceding the right to dig a canal, and the other chartering and protecting the company for its construction, must be ready to give appropriate guaranties of equal rights to all other interested states.

The problem restated, then, is this: How can an interoceanic canal be constructed and administered, securely and continuously, when the resources of the state in which it lies are inadequate to the purpose? Toward the solution of this problem are presented here those historical precedents which seem to bear upon it. And foremost should be studied the Suez Canal, the only interoceanic waterway in existence which presents the features described.

The Suez Canal was dug by a French company under a concession from the Khedive of 1856, confirmed by the Sultan, his suzerain. Article XIV of this concession embodied a formal declaration that the canal should be always open as a neutral passageway to merchant ships of every nationality. But this was clearly insufficient. For Egypt, even with the possible backing of Turkey, was too weak to make the decla-

ration good. A much stronger guaranty was needed for its effectiveness. Moreover, nothing prevented Turkey in case of war from blocking the canal or even breaking it. The world's commerce was not guaranteed against the guarantor. For the security of this commerce, a European concert was needed. What shape should this take?

Twenty years before a spade was struck into the sands of Suez, Prince Metternich had answered this question. In 1838 Mohammed Ali had asked his opinion in regard to a Suez Canal project, and received this reply: that if he wished to secure the accomplishment of his plan he should look to a neutralization of the canal by a European treaty. On this line the solution of the problem has been worked out, not without difficulties. The first step was taken in 1873. At Constantinople, in December of that year, was signed an agreement that the Suez Canal should be open to transports and ships of war of all signatories alike. Accepted by Turkey and the canal company, this act was acceded to by nearly all the European powers, including Russia. Thus the principle of European control was initiated.

In 1877 came the war between Russia and Turkey. It was of the greatest importance to commerce that the canal should be free from its operations. To this end Great

Britain issued a declaration that any attempt to blockade the canal or its approaches would be regarded as a menace to India and an injury to the commerce of the world, which would compel the abandonment of British neutrality. This threat drew from Prince Gortchakoff the announcement that Russia desired neither to interrupt nor threaten the canal's navigation, but, on the contrary, considered it an international enterprise, affecting the world's commerce, which must remain free from all attack.

The Arabi outbreak in 1882 threatened the security of the canal still more seriously, and proved even more forcibly the insufficiency of a merely Egyptian guaranty, the necessity of European control. France timidly declined the responsibilities of joint occupation, and thereby lost her share in the dual control. Great Britain shelled the insurgents out of Alexandria, occupied the canal as a base, and defeated Arabi's forces, acting throughout at the request of the Khedive. Her subsequent occupation of Egypt, *without* the urgent solicitation of the Khedive, is another matter, having a bearing upon the protection of the canal, but not upon its international status. It was induced rather by the English ownership of Egyptian bonds, and by the threatening rise of a fanatical invader out of the deserts. By

those who are always suspicious of England's good faith, her renunciation of sole control of the canal, while occupying Egypt, is a fact to be pondered.

Nor did the purchase of canal shares by the British government give it additional political rights. Were the Emperor of Germany to own a thousand square miles of land in Texas, it would none the less be subject solely to the sovereignty and jurisdiction of the State and the nation. So in the Suez Canal the jurisdiction of the sovereign was not qualified by English financial control. The relations of state and corporation were laid down by the concession under which the English government enjoyed rights in common with other shareholders. And this would be true in our own case were the United States to lend its credit to a Nicaragua canal. Rights in the line of management would be gained thereby, but the political status would not be affected.

In the case of Suez this status was not yet definitely and satisfactorily determined. By force of circumstances Great Britain had assumed, single-handed, responsibilities which properly belonged to Europe, and which she desired Europe to assume. An invitation to the powers with this end in view in 1883 remained unaccepted for two years. Then, in 1885, a commission repre-

senting ten states met in Paris to draw up for consideration an international act which should offer a definite form of control, capable of guaranteeing at all times and for all powers the free use of the Suez Canal.

This was the basis upon which was built the convention of Constantinople of 1887. Its conditions are briefly these:

The Suez Canal shall forever be free and open, in time of war as well as in time of peace, to the vessels, whether merchantmen or men-of-war, of all nations.

Neither it nor its approaches to the distance of three marine miles shall ever be blockaded.

The canal itself, the various works connected with it, and the Sweetwater Canal, which furnishes its fresh-water supply, shall ever be inviolable.

No act of war shall take place upon it, though belligerent ships may be using it, and a twenty-four hours' interval shall elapse between the departures of hostile ships from either terminal.

No troops or material of war shall be landed along it, and no ships of a belligerent shall be stationed in its ports, but neutral states may maintain not to exceed two ships of war each for its protection.

When, in the opinion of the representatives of the powers in Egypt, the security of the

canal is threatened, the government of the Khedive shall first be called upon for its protection. Failing this, the Porte shall have the duty of treaty execution laid upon it; and if Turkey should prove unequal to the task, the signatory powers shall act in concert with her.

No permanent fortifications are permitted.

No contracting power shall enjoy special territorial or commercial advantages in it.

The sovereignty shall reside, as before, in Turkey.

The accession of as many powers as possible shall be secured to this treaty.

These stipulations have been agreed to by Austria, France, Germany, Great Britain, Holland, Italy, Spain, and possibly others. Russia and Turkey held aloof, but in 1888 Turkey yielded to pressure and acceded. The present status of the Suez Canal, therefore, is that of neutrality guaranteed and protected by the leading powers of Europe with the exception of Russia.

The details of this arrangement have been given at some length, since they furnish the most valuable, in fact the only, precedent for the settlement of similar questions elsewhere—a settlement, it is right to add, which has not yet borne the test of war.

In our own diplomacy there is abundant

proof that for the most part similar ideals have prevailed.

Five routes have been proposed for a canal across the Central American isthmus. These are, in the order of southing, the Tehuantepec route in Mexico; the Honduras route; the Nicaragua route along the San Juan River and the lakes; the Panama route; the Darien or Atrato route—these last two lying in the territory of the United States of Colombia.

Of these five the first two were impracticable; our treaties with their sovereign states therefore touch upon railway, not canal, transit. The treaties negotiated by the United States which *do* relate to interoceanic canals and their status are three: with New Granada, now the United States of Colombia, in 1846; with Great Britain in 1850; with Nicaragua in 1867. The provisions of these treaties relating to a canal are here summarized.

1. The United States and New Granada, 1846, Article XXV.

Commerce of the United States crossing the Isthmus of Panama is put on an equal footing as to tolls, duties, or other charges, with the merchandise of New Granada. Any transit route constructed shall be always free and open to the United States. In return, and to render these rights secure, the United

States "guarantee positively and efficaciously to New Granada, by the present stipulation, the perfect neutrality of the before-mentioned isthmus, with the view that the free transit from the one to the other sea may not be interrupted or embarrassed in any future time while this treaty exists; and, in consequence, the United States also guarantee in the same manner the rights of sovereignty and property which New Granada has and possesses over the said territory."

This treaty is still in force, but may be terminated by either party on twelve months' notice. Under this guaranty the Panama Railway was built and operated, and the United States has in fact landed troops for its protection.

2. The United States and Great Britain, 1850, commonly known as the Clayton-Bulwer treaty.

This primarily sets forth the views and intentions of the contracting powers "with reference to any means of communication by ship-canal which may be constructed between the Atlantic and Pacific oceans, by the way of the river San Juan de Nicaragua, and either or both of the lakes of Nicaragua or Managua." In the second place, it lays down a general principle. Its main provisions are as follows:

Each government declares that it will

never "obtain or maintain for itself any exclusive control over the said ship-canal," nor fortify the same, nor acquire any exclusive privileges in it, nor fortify, colonize, or exercise dominion over any portion of Central America.

The canal in case of war shall be free from blockade to an indefinite distance from its terminals.

It shall be under the joint protection of the two governments, and its neutrality shall be guaranteed, that it may be forever free and open.

All other states shall be asked to enter into similar engagements. And this is not only a specific contract, but a general principle for the protection of any other practicable communications by rail or by canal across the isthmus. Comment on this much-abused and much-debated treaty is reserved for another place.

3. The United States and Nicaragua, 1867, Articles XIV, XV.

This grants to the United States and its citizens the right of transit across Nicaragua from ocean to ocean, on any route of communication, natural or artificial, by land or water, which may be constructed, on equal terms with itself. All rights of sovereignty are reserved.

"The United States hereby agree to extend

their protection to all such routes of communication, as aforesaid, and to guarantee the neutrality and innocent use of the same. They also agree to employ their influence with other nations to induce them to guarantee such neutrality and protection. Free transit is granted United States troops and ships under conditions. After protection, when necessary, has been afforded by United States troops, they must be withdrawn."

It is terminable at twelve months' notice.

One common feature runs through all these treaties: that whatever canal is built shall be neutralized, that is, exempted in some way from all the operations of war. The same idea appears in the agreement between the United States of Colombia and Lieutenant Wyse, acting for the French Panama Canal Company. By Article V of this instrument the "government of the republic declares neutral in all times the ports of both extremities of the canal and the waters of the latter from one ocean to the other," but forbids the passage of the war-ships of its enemies unless they have gained the right by treaty.

When we ask, however, how this neutralization is to be secured, there is a lack of uniformity. In the case of De Lesseps's Panama Canal, it was declared by the sovereign of the country. The Panama Canal

of 1846 was to owe its neutrality to the United States alone. Our treaties of 1850 and 1867, just cited, contemplate a neutralization joined in by other powers, that is, a general concert of nations.

This remained our policy until about 1880. With the beginning of work by De Lesseps at Panama came a change. Secretaries Blaine and Frelinghuysen argued for a neutralization to be undertaken by the United States exclusively, and finding the Clayton-Bulwer treaty in the way of this pretension, attacked that. Mr. Blaine said it needed modification; Mr. Frelinghuysen called it voidable; both by implication admitted its existence. It is true that the Clayton-Bulwer treaty left a string of misunderstandings behind it. It was entirely satisfactory to neither party. But what cannot be denied—and this is emphasized here—is the fact that throughout the entire history of this country's attitude toward a Central American canal, the neutralization of that canal has been held desirable, a status to be effected sometimes by the sovereign of the route, sometimes by the United States alone, more often by many states acting together.

As in the case of Egypt and the Suez Canal, neutralization by the sovereign solely is not strong enough to build on and to build

under. So that really the choice must lie between a neutral status guaranteed by the United States alone, and one guaranteed by many commercial powers. To the former policy there are two very serious objections. The first is this: A guaranty of neutrality by a single state in the nature of things cannot be effective. You may *protect* in case of *attack*, but you cannot neutralize. The guaranty of the neutrality of a state is a guaranty that it shall not be a combatant in war, nor be affected by its operations. As against the guarantor this is good; as against all third powers it is worthless. For how can one state prevent another from the exercise of its sovereignty, of which the right to make war is an important feature?

In Wharton's "Digest of the International Law of the United States" this view is clearly presented (last paragraph, § 145): "Neutralization is the assignment to a particular territory or territorial water of such a quality of permanent neutrality in respect to all future wars as will protect it from foreign belligerent disturbance. This quality can only be impressed by the action of the great powers by whom civilized wars are waged and by whose joint interposition such wars could be averted. As the neutrality of the isthmus is by the convention before us [with New Granada, 1846] guar-

anted only by the United States, it is not a neutralization in the above sense, but only a pledge and guaranty of protection." And again and more specifically, the United States do not possess, and could not raise for a considerable time, ships and men enough to make their sole guaranty of the neutrality of a Central American state or of the waters of a Central American canal good against all assailants. It is easy to say that the power of this great country is illimitable. That may be true. But to translate this power into ironclads requires a change of national policy, years of time, and unlimited expenditure.

There is, then, both a legal and a practical difficulty—though both, in truth, are practical—in the way of a guaranty of the neutrality of a canal by the United States singly. But let all commercial powers act in unison, and see how simple the thing may become. Protection becomes effective, and the canal status fixed, because each power for itself unites in the protection, lays down the status, and renounces the right to injure. "Neutralization" becomes actual and practical because each power, in the exercise of its sovereignty, promises to respect the neutrality. The empty phrase becomes a fact.

The argument, then, thus far is this:

We find in the history of the Suez Canal

a powerful precedent for the policy of general rather than single-handed canal protection.

We find in our own treaties and diplomacy a uniform desire to keep an interoceanic canal free from all the operations of war, sometimes inclining to the rôle of sole protector, more often desirous that this responsibility shall be assumed by all commercial states.

We find that "neutralization" is incapable of being effected by the act of a single protecting power; that "protection" demands superior force at command to be adequate.

We should now be in position to consider the second part of our question, which is this: In order to exempt a proposed Nicaragua or other interoceanic canal from the dangers and operations of war, is it better for the *self-interest* of the United States that this should be attained by a general or a sole guaranty? This question is considered in the next chapter.

AN INTEROCEANIC CANAL FROM THE
STANDPOINT OF SELF-INTEREST

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AN INTEROCEANIC CANAL FROM THE STANDPOINT OF SELF-INTEREST

WHAT does the United States want of an interoceanic canal? How can it best get what it wants? These are questions of policy which may shortly require an answer.

It is often asserted, in and out of Congress, that the United States must "control" any such waterway, and it is commonly believed that by lending the national credit to the company, by seeing the work through, the right to such control will be acquired. The first of these statements is indefinite; the second is mistaken. The fixing of rates, the choice of officials, the physical and financial regulation of the canal, might indeed be gained by this government, as by any other controlling stockholder, subject to the conditions of the concession; but the political control, the right to determine its international status, its use in war-time, its protection—this is an attribute of sovereignty

qualified by treaty. As has been argued in the case of Great Britain and the Suez Canal, the rights of the stockholders and the rights of the sovereign have no real connection; they lie in different planes.

Though no control in a real sense is acquired by financial ownership, it may be gained by a surrender of sovereignty. The simplest form which this could take would be the transfer of sovereignty over the region in which the canal lies. This region might be ceded to another state or be raised to statehood itself with the condition of neutrality attached to it. For instance, the annexation of Nicaragua by the United States, or the cession of canalized territory to it, would give us real control.

More complicated is the condition which results from a *partial* surrender of its jurisdiction by the sovereign in favor of one or more powers. This would be effected by formal treaty. An example of this is our protection of the Panama Railway, under the treaty of 1846 with New Granada, which carries the right of landing troops and exercising jurisdiction for a specific purpose. But is there not another right of action in Central American affairs based on the Monroe Doctrine, which belongs to the United States exclusively, and which by common report is as well grounded as any treaty stipulation?

This is apt to be construed as warranting the United States in interfering to prevent any and all European claims upon our neighbors in the South which involve territory. Now, without going at length into the history of the Monroe Doctrine, it is enough to say that it is a very good thing when properly used and interpreted. For it is still the settled policy of the United States to prevent European powers from armed interference in the politics of South and Central American states against their will.

The French intervention in Mexico during our Civil War is an instance where the Monroe Doctrine was properly applicable. But being somewhat vague and never crystallized into a law, a great deal of extraneous matter has been read into it, until it has become a political fetish superstitiously worshiped by the whole tribe of Jingoists. They will have it mean the right of interference by the United States, instead of what it really is—a protest against foreign interference. They would make of it a law overriding treaties, instead of an expression of policy quite subordinate to treaties. They hail it as the American policy, forgetting that Canning first suggested it. They build upon it a “manifest destiny” theory, overlooking the fate of the house in Holy Writ built upon sand.

The United States has a peculiar interest in the affairs of those countries lying to the south of it, as being itself the most powerful and influential state on this continent. It has a peculiar interest in any canal which will bring its western and eastern coasts many thousands of miles nearer by water. To it, therefore, belongs the right, nay, the duty, of securing the use of such canal by its vessels of every class, in war and in peace, under the most favorable terms.

Emphasizing all this, it is asserted that the Monroe Doctrine is not the instrument fit to accomplish these results. As well use a saw to drive a nail. You blunt your tool and do not gain the end desired.

The proper weapons are to be sought for in our treaties, made and to be made, and in those general principles of law which govern the intercourse of nations.

As to the principles of law, for lack of specific rules to cover this new question, we have the wider expressions of that order which binds the civilized world together. Such are the principle of non-intervention; the most-favored-nation treatment; freedom of navigation; freedom of intercourse; neutral interests paramount to belligerent interests; good faith; observance of treaties.

As to treaties, the precedents for the treatment of an interoceanic canal have already

been cited. The issue was there defined between canal protection assumed by the United States alone, and canal neutralization carried out by a concert of nations, precedent being in favor of the latter. In the following pages some considerations are presented to show that sole protection and sole control by this country are neither practicable nor desirable. This is an argument from the standpoint of self-interest.

What does the United States want of an interoceanic canal? Clearly it is its uninterrupted use under all circumstances by merchantmen and men-of-war alike, whether itself a belligerent or a neutral, on the footing of the most favored nation. Our most ardent patriots have never claimed lower tolls than other countries, nor exclusive commercial use. But is there nothing more? Is there not a darling wish entertained by some, for which no price seems too dear, and which would make the canal of peculiar value to our own land? There certainly is. Though not often formulated clearly, but wrapped rather in the cerement of stately words, this wish appears to be for an *exclusive* use of the canal by the navy of the United States when a belligerent. Suppose, for example, England and this country to be at war: then our ships could pass the canal, could mass or separate for attack and defense, while her

ships would be debarred. The value of such a right is at once apparent. But is it attainable, and what would be the cost?

The difficulties in the way are these:

First, no power of the first class would permit the negotiation of such an arrangement without a protest which would probably lead to war. To suppose that Germany, for instance, or Great Britain would consent to such a provision in our favor would tax the credulity of a child. The very first result of such a treaty would be a combined demand of Nicaragua by all the maritime powers that they each and all be put on the footing of the most favored nation, that their warships be granted transit at all times as well as ours. This demand would be reasonable, for how could they afford to tie one hand behind their backs in advance of a contest? To meet it successfully would require a defensive alliance of the United States and Nicaragua, backed by a fleet as large as the combined fleets of the remonstrants.

But suppose, for argument's sake, that foreign powers display no such sensitiveness as to their interests and their rights, and fail to combine against us. Suppose that our sole guaranty of the canal, coupled with its exclusive military use, is permitted to pass unnoticed or with a diplomatic remonstrance merely. Suppose the canal garri-

soned by our troops, in violation of the Clayton-Bulwer treaty, which had been officially declared to be abrogated. What follows?

We are the sole protectors and guarantors ; we must maintain, therefore, on the spot a force sufficient for this end, or the canal may be broken, even ruined. Single-handed we must crush out riot and revolution. Strange responsibilities in Central American politics must be assumed, constant influence exerted, or else our protection would be nugatory. And, apart from local dangers, a war may arise to which we are a party. We should require an army of occupation as large as any which our enemy could land, a fleet equal to that which he could equip, and the canal would be made simply the first scene of the struggle. It is apparent that this would involve a complete change in the policy which has guided this republic from its earliest years, that it would result in a struggle far from our natural base, on disadvantageous rather than advantageous ground, against, not in accord with, the sentiment of the political world.

There is another objection to the exclusive war use of a canal by the United States, coupled with that guaranty of its neutrality, whether sole or general, which all our treaties have contemplated. The two are inconsis-

tent. The *exclusive* use in war would conflict with the neutral status. Imagine the perpetual neutrality of Belgium qualified by an exclusive right of transit across its territory granted to German armies. All powers must approach a canal on an equal footing, or its neutrality will become an alliance between its sovereign and the favored nation.

Let us suppose, on the other hand, that our policy follows more moderate counsels. Guided by European precedent and the provisions of our own treaties, it renounces the attempt to shoulder singly the task of canal protection. Calling in the coöperation and aid of all powers likely to make commercial use of the canal, this country, taking the lead, proposes to place it on a footing of neutrality guaranteed by all. All have a common right of passage, in peace and in war, for war-ships and for merchantmen. The coast sea off the terminal ports, for a distance of fifty or a hundred miles, is also exempted from the operations of war. Proper provision is made, as in the Suez Canal convention, for the avoidance of the hostile meeting of belligerent ships. Military occupation for internal security, protection from outside pressure, are joint, not single. A violation of the integrity of the canal is an attack upon, and will be resented by, the whole commercial world.

With absolute confidence it may be asserted that such a status, such a solution of the problem as this, would give the United States every advantage which it could hope to reap from the canal, save and except the exclusive right, as against an enemy, of using it in case of war. Is this single privilege worth what it would cost—the abandonment of settled policy, the yearly expenditure of army and navy enormously increased, the greater danger of political complication? This price is real, not imaginary. A nation with a chip on its shoulder cannot rely on bluff and bluster alone. That this is more or less clear to the advocates of a “spirited foreign policy” is let drop occasionally. “I would be willing to go to war to prevent England from obtaining control of the Nicaragua Canal, or from interfering in our control of that waterway,” a member of the House is reported to have said recently, amid a chorus of approval, as if the two were equivalent statements.

We may well agree with him as to his first proposition, but just as surely does it follow that *our* control would be regarded with similar jealousy by other states.

Why go to war, however,—an expensive and uncertain business,—when the same end could be reached by general concert of powers? Why go to war with Great Britain,

in particular, on the subject of canal control, when by a solemn treaty that country already has renounced canal control?

But here arises a serious question. That Clayton-Bulwer treaty of forty-eight years ago, which has just been alluded to, is it now in force? Is it really a good thing to get rid of, if in force?

The charge has been made that it is no longer valid because long ago violated by Great Britain. This violation lay in retaining control over certain Central American territory in spite of the treaty, the excuse and defense being that the treaty was not intended to refer to the status existing at its negotiation. Since then—very slowly and very exasperatingly, it is true—all such territorial claims have been yielded, the Mosquito protectorate quite recently, until nothing clouds the validity of this treaty except what is past. Now, so far as appears, no responsible official in this country has ever claimed that this treaty is actually void, but merely that it should be amended or, at worst, is voidable. A treaty unlimited in its terms as to duration must certainly be held binding until notice of its abrogation has been given. No such notice exists in this case. Two secretaries of state have argued that there was ground for terminating it, and a committee of Congress once reported

in favor of its abrogation; there the matter dropped. To say that this treaty is no longer binding, therefore, is to be inaccurate. Even admitting that there is reason for its abrogation, it must be considered still in force. And what I desire to emphasize here is the extreme impolicy of such abrogation, the very decided present value of this Clayton-Bulwer treaty to the United States.

What state is it, as we are so constantly told, which arbitrates with the strong and bullies the weak? Great Britain. What state is it, on the same authority, which for schemes that are subtle, for earth hunger, for trade expansion by fair means and foul, for the liking to have a finger in every other nation's pie, is most notorious? Again Great Britain. She, then, is the power most to be dreaded as a meddler in Central American affairs. If so, the Clayton-Bulwer treaty is an instrument made to our hand. It is a bulwark of defense, a contract to be enforced, not surrendered. Listen once more to its terms:

"The governments of the United States and Great Britain hereby declare that neither the one nor the other will ever obtain or maintain for itself any exclusive control over the said ship-canal; agreeing that neither will ever erect or maintain any fortifications commanding the same, or in the

vicinity thereof, or occupy, or fortify, or colonize, or assume or exercise any dominion over Nicaragua, Costa Rica, the Mosquito Coast, or any part of Central America."

Does Great Britain covet Corn Island, commanding one terminal of the Nicaragua Canal; does she "exercise dominion over" Corinto, to hold as indemnity for a debt; does she seek to control the future canal in any way? We appeal to Article I of this treaty. We do more—we enforce it. To an aggressive power it is a strait-jacket.

In a frank and striking passage which is contained in one of Mr. Blaine's despatches to Mr. Lowell,¹ this is well expressed: "I am more than ever struck by the elastic character of the Clayton-Bulwer treaty, and the admirable purpose it has served as an ultimate recourse on the part of either government to check apprehended designs in Central America on the part of the other; although all the while it was frankly admitted on both sides that the engagements of the treaty were misunderstandingly entered into, imperfectly comprehended, contradictorily interpreted, and mutually vexatious." Why, then, should we seek to do away with it? The only possible reason can be, because *we* seek to control, to occupy, to fortify, to do the things we there renounce—in short, to assume the aggressive ourselves. This, then,

¹ November 29, 1881. MSS. Inst. Gr. Brit. For. Rel., 1881.

is the real object and ideal of the opponents of this treaty. They would throw away the shield to grasp the spear more firmly. They would prevent the building of a canal, unless permitted exclusive rights in it. They would choose a policy without regard to cost and consequence. Here, then, we have come to the parting of the ways.

In the one direction lie "peace with honor," a growing trade, a traditional policy, the military and naval establishments of to-day, the enforcement of the Clayton-Bulwer treaty, a well-considered plan for *general* protection and guaranty of the canal which commerce cries out for.

In the other lie single control, the abrogation of every treaty which stands in the way, an army and navy to make our position good, the exclusive use of the canal, as against our enemies, by our navy in time of war. In short, it is to prefer belligerent to neutral interests, and to launch forth into the troubled sea of foreign politics.

To enforce or to abrogate the treaty of 1850; to use the canal on the same terms with other states, or to insist upon exclusive military privileges in it—these are the real points at issue. Between these policies let the American people choose, counting the cost of each, and striving to see which will bring it honor and true ascendancy and the highest good.

AN INQUIRY CONCERNING OUR
FOREIGN RELATIONS

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AN INQUIRY CONCERNING OUR FOREIGN RELATIONS

THE number of controversies with foreign powers which have arisen of late must have impressed every student in the department of foreign relations. Upon putting together the facts involved in several of these "difficulties," and comparing their causes, the question has presented itself, whether one main cause has not led to all of them, and if so, whether this does not indicate a change of foreign policy.

This policy was originally outlined by Washington in his farewell address, in that noble passage beginning: "Observe good faith and justice toward all nations; cultivate peace and harmony with all." It was believed to consist in the avoidance of encroachments upon, as well as of entanglements with, other states. Long ago we reached the position of indifference to foreign influences which Washington aimed at. Too often have we failed of the good faith

and justice which he inculcated. But the peculiar advantages of our position are the same, our duties are the same, now as then. If there appears a change in our foreign policy, we have a right to question it; we may still test it by the spirit of our early diplomacy.

THE BERING SEA CONTROVERSY

EVER since the recognition of our independence by Great Britain, our fishery relations with her colonies have been in an unsettled condition. One arrangement has followed another, the treaty of 1818, in its terms perpetual, being the basis upon which they have been built up. At several periods in our history we have had to complain of high-handed treatment of our fishermen and of the illegal seizure of their smacks by the provincial authorities. Nor have our fishermen been without fault, in fishing within forbidden waters, occasionally in entering upon a forbidden traffic. But now the tables are turned. Since 1885 United States ships have seized some and warned away many more of the British Columbian sealers for operating in the waters of Bering Sea. The controversy resulting, as yet unsettled, is the first on our list to claim attention.

The habits of the fur seals and the methods of capture are as follows: During the winter

season the seals are widely scattered in the Pacific Ocean. In April they travel northward, and repair to certain breeding-islands lying in the Bering Sea. One group of these islands belongs to Russia, another to the United States. It has been the practice of our government to farm out its seal-fishery to a company, under conditions of rental, tax per skin, and limitation of slaughter. This company's employees protect the seals in the Pribyloff Islands from depredation. After the females have landed, they keep near shore with their young. The bachelors of a certain age are quietly driven inland and there killed. After some months, when the bearing and breeding processes, thus rendered undisturbed, are completed, the seals all put to sea again. It is in the spring and early summer, when the seals are on their way to the rookeries, in the open sea, traversing the passages between the fringe of Aleutian Islands, which mark off the Bering Sea from the Pacific, or cruising the coasts, that latterly they have been intercepted by what we term the seal-poachers. These men, belonging to the United States as well as to British Columbia, by their indiscriminate killing of females as well as of males, and losing many, as they must, through the sinking of the carcasses, have seriously diminished the source of supply.

Now it is of considerable importance to both Great Britain and the United States that this sealing industry should be preserved, for the skins are cured and dressed in London, while the direct revenue is paid to this country. A close season and a regulated slaughter are probably essential to preserve this interesting animal from extinction. The real question then is, whether such regulation shall be brought about through diplomatic agreement, or whether we can establish it through force as a matter of right. Over our own sealers, and over foreign sealers in our own coast sea, we undoubtedly have jurisdiction. But have we lawful jurisdiction over the operations of foreigners many miles from land, where most of our captures have been made?

Such jurisdiction cannot arise from our ownership of the seals, for they are wild animals uninclosed, and can be owned by nobody.

It cannot arise from the contention that their slaughter by foreigners is *contra bonos mores*, for that is a meaningless phrase, upon which no legal rights of capture can be founded.

Nor, once again, can it arise from the assertion that the Bering Sea is a *mare clausum*, and not a part of the high sea, since that assertion cannot be substantiated in

fact. The Bering Sea is too vast to be under the control of any one nation. The territory of the United States borders less than half of it. Russia gave up a similar claim. It is inconsistent with the spirit of modern politics. If we have exclusive jurisdiction over the Bering Sea, then, it must spring from our ownership of adjacent land, and from that alone. For it must always be kept in mind that jurisdiction is not a thing separate and complete in itself, but only an incident to the possession of certain territory. Our question, therefore, presents itself thus: Has the United States through its possession of Alaska acquired exclusive jurisdiction over the Bering Sea? Here it must first be remarked that the presumption is against us. The vast exclusive claims to jurisdiction over broad stretches of sea, once in vogue, have become obsolete. Portugal and Spain no longer assert peculiar rights in great tracts of ocean, with a papal bull as a warrant. England no longer compels foreign ships to lower their topsails to her in the narrow seas. American fishermen may fish as freely as Canadians in the Gulf of St. Lawrence, if they keep offshore. Even the waters of the Bay of Fundy, after tedious disputation with Great Britain, are agreed to form part of the high seas.

But the Alaska purchase was made from

Russia, and it seems to be from Russia that we derive the rights of jurisdiction to which we lay claim. As expressed in its diplomatic correspondence, our government asserts that Russia had controlled the fisheries of those waters from their discovery until 1867; that until 1886 they had been in undisturbed possession of the United States; that thereby an exclusive right had been acquired in them. Our exclusive jurisdiction being thus derived from Russia, we must prove that she owned and exercised it, and that the Alaska purchase treaty conveyed it.

It is a fact that Russia once claimed exclusive rights over the coasts and waters of the Bering Sea from the Straits to the fifty-fourth degree of north latitude. But neither Great Britain nor the United States would submit to such pretensions. Chancellor Kent and John Quincy Adams denied and opposed the claim. The result of our diplomatic protests is seen in the treaty of 1824 between Russia and the United States. "It is agreed that in any part of the Great Ocean, commonly called the Pacific Ocean or South Sea, the respective citizens . . . shall be neither disturbed nor restrained, either in navigation or in fishing, or in the power of resorting to the coasts" at unsettled points for trading. In 1825 a similar treaty was made by Russia

with Great Britain. Both treaties were limited to ten years. It is not practicable to argue that the Bering Sea was not a portion of the Pacific Ocean in the view of these treaties. The Bering Sea is a body of water three times as large as the Gulf of Mexico, separated from the Pacific by a string of one hundred and fifty islands, mostly mere islets, in a line measuring perhaps twenty-five hundred miles, with spaces as wide as two hundred miles between them—a separation only in name. The claim of our government that Russia had exercised undisturbed exclusive sovereignty over the Bering Sea until 1867 is upset, therefore, by two treaties and by our own diplomatic history. Moreover, as Lord Salisbury has urged, the fact of non-use of a right, even if proved, does not imply abandonment of that right.

Again, by Article I of the convention for the cession of Alaska was surrendered “all the territory and dominion now possessed by his said Majesty on the continent of America and in the adjacent islands, the same being contained within the geographical limits herein set forth.” Lines are drawn across the ocean “within which the territories and dominion conveyed are contained,” but no mention is made of jurisdiction over a great stretch of sea as a thing granted. No jurisdiction was or could be granted,

except what attached to the land ceded, and that passed as a thing of course. Whatever rights we have in Bering Sea away from land exist *only* by virtue of ownership of that land, and are not distinguishable from similar rights attaching to governmental possession of land elsewhere.

Russia based her claim to exclusive jurisdiction over these waters upon her ownership of *all* the territory inclosing them. Her claim was successfully resisted. We now own less than half the coast that Russia did, and yet are found setting up the same claim.

Are not these principles clear?

The Bering Sea is part of the high seas, and sealing, beyond the three-mile limit in it, can be prevented only by an exercise of sovereignty over it. Such right of sovereignty we denied to Russia. Such right we now claim, as derived from Russia. Such right, if Russia possessed it, could only be an incident to the ownership of the coasts, and could not exist and be conveyed independently. There is no evidence of an attempt to convey it independently. Its territorial right in a portion of the coast bordering the Bering Sea does not give this country exclusive jurisdiction over the said sea for a certain purpose, or for any purpose. Our fishery disputes with Canada, the precedents in our own history, maritime

law, common sense, all discredit the idea. It is a great and an undue stretch of the jurisdiction of the United States to capture twelve ships and warn off a great many more for engaging in a species of fishery many miles from land.

THE BARRUNDIA AFFAIR

BARRUNDIA, formerly minister of war in Guatemala, had been exiled in 1885, and resided in Mexico. Taking up weapons against his native state, he was disarmed by the Mexican authorities and conducted to Acapulco, there being requested to leave the country whose neutrality he had violated. He accordingly took passage on the Pacific Mail steamer *Acapulco* for Salvador. She touched at Guatemalan ports, but Barrundia felt secure under the United States flag. At the first port, Champerico, the Guatemalan authorities demanded Barrundia's surrender, but the captain of the *Acapulco* refused to allow any officers on board.

The Guatemalan government then requested the American minister, Mr. Mizner, to direct Captain Pitts of the *Acapulco* to surrender his passenger, charging him with sedition, treason, and conspiracy against the government. Mr. Mizner asked for and received assurances of a fair trial and no

death penalty, in Barrundia's behalf, as Guatemala was then under military law.

The *Acapulco* came into port at San José August 27, 1890. Commander Reiter of the *Ranger* boarded her, and was asked by Pitts to protect his passenger. He replied that he could not act without authority from the governor of the port. Pitts then wired Mr. Mizner, who answered that the *Acapulco* was within the jurisdiction of Guatemala, and that the authorities had a right to arrest any one charged with offenses against the laws of their country. To the Guatemalan minister of foreign affairs he made a similar reply, that the United States could not object to the exercise of local jurisdiction over the *Acapulco* while in Guatemalan waters; and then reminded him of his promise. Colonel Torielle then boarded the *Acapulco* with a few soldiers, and demanded Barrundia. Pitts again appealed to the officers in the American man-of-war, who replied that the matter was out of their jurisdiction. The arrest was then attempted. Barrundia drew pistols, fired at Colonel Torielle, and in a scuffle was shot by the Guatemalan soldiers. Mr. Mizner protested against the shooting as in violation of the promise made him. Shortly after, Barrundia's daughter shot at Mizner in the legation, charging him with being the cause of her father's death.

There is nothing very unusual in this petty tragedy. Nothing is clearer than that a merchant ship within the waters of a foreign state is under that state's jurisdiction. One of our men-of-war could have furnished Barrundia an asylum, had he reached it, but surely it is not the business of our navy to exert itself actively in rescuing political exiles from the laws of their offended states. Asylum, when it ceases to be passive, is rescue—a very different matter.

Both Commander Reiter and Mr. Mizner, then, judged by the rules and precedents of international law, acted with absolute propriety. Suppose that the *Trent*, with Mason and Slidell on board, had sailed into New York harbor, would the right of their seizure have been questioned by any power on earth? And yet—and this is the point of this whole relation—the action of these two gentlemen proved so unacceptable to their government that the one was recalled, and the other removed from his command with a reprimand. The Secretary of the Navy wrote to the latter: “It was your plain duty to proceed at once to meet the steamer before she cast anchor in the port, to warn the captain of the danger, and to offer to his passenger, should he desire it, an asylum on board your ship.” Having learned the facts, “it is impossible to suppose that you would have failed to offer the

fugitive an asylum. Such an act could have violated no rights of the territorial government, for no rights over the person of the passenger could have yet vested; while it would have maintained the implied promise of protection which the United States makes to all who in good faith embark under its flag. By remaining inactive you neglected your obvious duties, and placed your government in the position of renouncing those who had sheltered themselves under its flag."

Here, as in the Bering Sea affair, we notice a marked extension of the jurisdiction claimed by the United States. It announces to its naval officers the duty of protecting all political refugees sailing under its merchant flag, even when within the waters of the country to which those refugees belong, by strategy, if not by force—the duty of bringing asylum to them, instead of permitting them to seek it. This was destined to bear fruit.

THE "ITATA" CASE

IN Chile, in 1890 and early in 1891, Balmaceda, by his arbitrary and unconstitutional conduct, had driven a portion of the country into rebellion, but the Congressionals had no ammunition. Arms and gunpowder they therefore must buy. This the

Itata, a merchant steamer, tried to do at the Californian port of San Diego. She was hospitably received at San Diego, spent some time there quietly, then coaled, and was about to put to sea. At this point it was reported that a smaller boat, presumably loaded with materials of war destined for the *Itata*, was waiting for her off an island out at sea. The *Itata* was accordingly seized on the charge of attempted breach of the neutrality laws, and a deputy United States marshal put in charge. Unwilling to be thus balked of his object, her captain put to sea, without his clearance papers and with the deputy on board. The latter was landed at the entrance of the bay. The *Itata* met her tender, shipped its cargo, and sailed for Chile. Thereupon began that sensational chase by the new cruiser *Charleston*, which ended, not in the capture intended, but in the surrender of the *Itata* by the Congressional leaders after she had eluded her pursuer.

When we apply the recognized law to this seizure, chase, and surrender, we are struck by the unusual zeal of our government. Hitherto it has been considered lawful for our merchants to sell arms to all the world, at peace or at war. Fitting out an armed expedition is illegal, but this was in no sense such; it was a purely commercial transaction. Balmaceda had his rights of capture of these

contraband articles, but it has never before been the policy of this government to assist others in enforcing their war rights of capture for breach of blockade or for carrying contraband. It is true that the fact of transshipment of arms outside the three-mile limit does not alter the nature of the transaction, but the transaction was not a guilty one, and there was no reason for such concealment. In leaving without clearance and in carrying off a deputy marshal (said, by the way, to be merely a private detective, and not an officer of the government), the *Itata* may have technically violated our revenue laws; but that was the worst with which she could be charged, and that was the result of an improper seizure. And how must one characterize the chase of the *Itata* over thousands of miles of open sea? Pursuit hot and continuous, by a revenue-cutter, for breach of revenue laws, has been known, extending to the high seas. But the *Charleston* started from San Francisco, five hundred miles away, and scoured the ocean for her prey, with the intention of capturing her, even if it led to a collision with a Congressional cruiser in Chilean waters. Such a pursuit, with such an object, appears to be absolutely novel. A state at peace has no jurisdiction over the ships of other nationalities on the high seas, except on suspicion of piracy.

Such a stretch of jurisdiction on the part of the most powerful state on this continent must necessarily appear an alarming matter to all its neighbors. The *Itata* was brought back to San Diego, lay there awaiting trial for several months, and then the case against her was dismissed, as well as that against the tender *Robert and Minnie*. They had committed no breach of our laws in the judgment of our courts.

This *Itata* matter naturally created a sentiment among the Congressionalists hostile to this country. Her surrender, dictated by the desire of that party to stand well with the government at Washington, and by their lack of a political status, left a sore spot, which their sudden success did not lessen. Obtaining ammunition from a European source, the Congressionalists at last were enabled to take the field, and Balmaceda and his party chiefs were defeated. In view of the wish of the United States to advance its political and commercial influence in Chile, this failure of our minister resident and of our admiral to "pick the winner" was most unlucky. The poor Balmacedists fled, fearing the vengeance which their cruelties had provoked, and some naturally sought asylum at the United States embassy. At the cost of much discomfort this was accorded by Mr. Eagan, as it had been accorded to the

Congressional fugitives when Balmaceda was supreme.

Now this right of asylum in the South American republics is one that is governed by a usage rather different from that in vogue on the European continent. The legations are permitted to shelter political fugitives almost universally, and Chile in this instance did not attempt to question Mr. Eagan's privilege. At the same time, the correspondence of our various secretaries of state shows that, though recognizing this difference of usage, they do so with reluctance, believe that it should be construed strictly, and deem it inconsistent with true equality of states.

Thus, in the printed personal instructions to diplomatic agents (1885), we find that "this government does not sanction the usage, and enjoins upon its representatives in such countries the avoidance of all pretexts for its exercise."

Mr. Frelinghuysen to Mr. Langston, in Hayti (1883), uses the same words.

Mr. Fish to Mr. Preston, in Hayti (1875), argues at some length against the frequent recourse to asylum in the legation, "especially in the governments to the south of us," since "such a practice obviously tends to the encouragement of offenses for which asylum may be desired."

Mr. Fish to Mr. Cushing, in Spain (1875), characterizes the practice as an annoyance and embarrassment to the ministers whose legations are thus used, and to their governments, and as a wrong to the government and people where it is practised; to be mischievous in its tendencies, and to tend to political disorder.

Mr. Seward, in 1868, expresses himself thus: "The right of a foreign legation to afford an asylum to political refugees is not recognized by the law of nations as applicable to civilized or constitutionally organized states." The chronic revolutionary condition of many of the South American nations has caused the usage to be recognized. "We have, however, constantly employed our influence for several years to meliorate and improve the political situation in these republics, with an earnest desire to relinquish the right of asylum there. In the year 1867 we formally renounced that right in the republic of Peru."

Mr. Webster, in 1851, to Mr. Peyton, in Chile, writes: "Acquiescence by the government of Chili on former occasions in the exercise of the hospitality of asylum in its larger sense may preclude that government from objecting to the continued granting such hospitality to the same extent. At the same time, if that government makes objec-

tion to the granting of that hospitality to a particular political refugee, the minister of the United States, in whose house such refugee is sheltered, should advise him that this shelter can no longer be afforded."

Mr. Clayton to Mr. McCauley (1849) states that "though the privileges of asylum in South America are more liberally dispensed than in the leading European states, they should be in all cases carefully guarded."

Mr. Calhoun, in 1844, is the only secretary of state to take the opposite tone: "The right of diplomatic asylum in revolutionary times and in revolutionary countries should be indulgently construed."

Taking this almost uniform policy as our test, we find that the asylum extended the Balmacedists by Mr. Eagan, acting under instructions from Washington, was excessive, in that it was granted to so large a number, in that its duration was unlimited, and particularly in that a safe-conduct out of the country was insisted upon, and finally obtained, as a corollary to the right of asylum.

While the controversy over this matter was in progress, many seamen of the United States steamship *Baltimore*, on shore leave in Valparaiso, were assaulted by what looked like an organized mob, and two were killed. This deplorable affair caused great excite-

ment, and something like a war spirit was aroused in this country. Arrests were made of persons suspected of the violence, and the Chilean government, hardly established yet, expressed its regret, though not very feelingly. The slow criminal process in Valparaiso dragged along, and several of the suspects finally received light sentences.

Meanwhile the *Baltimore* returned to San Francisco, where an examination of witnesses of this affray was conducted by the judge-advocate of the navy. This, of course, was *ex parte*, the Chilean government having no counsel present. According to the evidence there adduced, the riot was probably caused by race feeling, but the first blow was struck by an American seaman, and the men had visited several saloons, though "perfectly sober."

Our seamen ashore in Valparaiso are not under the jurisdiction of the United States. Chilean law and procedure alone are applicable to them. It is only when we have reason to believe that gross injustice has been done that we have a claim to review their findings. In the New Orleans lynching we insisted that the Italian government should await the action and decision of our courts. Why did we not owe the same respect to the Chilean judge? And were not the unwillingness of the executive to show

this, and its appeal from Chilean jurisdiction in taking fresh *ex-parte* evidence and basing action upon it, an attempt to escape from the consequences and rights of that jurisdiction and to set up our own in place of it—in other words, a fresh example of the enlarged view of our rights of sovereignty to which we are fast accustoming our people and in which we are training our navy?

LOOKED at from this point of view, it will be seen that all these instances related show one and the same tendency—an attempt on the part of this government to stretch its claims of jurisdiction unduly. Now what does this mean, and what will it involve? It means, in the first place, a departure from the old and safe policy of the fathers. It means courting rather than avoiding foreign entanglements. It means one collision after another, each with its sulphurous war-cloud about it. It means the violation of former precedents, setting up new ones in their stead which may prove awkward, even dangerous. It will encourage aggressions upon weak neighbors. It will make this country hated and distrusted by its natural friends. It will weaken its commercial position on this continent, throwing trade into other channels than our own. Years must pass before Chile can forget her bitter ex-

periences at the hands of the United States and open her arms to our trade freely. International trade is largely based on sentiment.

And, again, what will this new policy, if persisted in, involve? If we assume an advanced position, we must be prepared to maintain it. We shall need a larger army; a navy of the first rank; an increase of taxation to pay for these; a reversal of our military and naval policy to maintain them.

We should have, then, also a much larger admixture of foreign influences and foreign questions in our domestic politics. A presidential campaign might be decided, not by the belief of a party as to questions of currency or the tariff or the civil service, but by its spirited foreign policy. Would this be likely to give us better government?

Can we afford to turn aside from the problem which is ever before us: how a great free people can best work out its own salvation, can purify the ballot, can make capital safe and labor contented, maintain the law and keep corruption under, develop its resources and promote general prosperity?

The tendency which has been emphasized, to stretch the jurisdiction of this country beyond the law and the usage, is not one which will stand still. It must be checked at

once or grow greater. Every instance of it will raise a controversy. Every controversy will bring us nearer to the necessity of striving to be the dominant influence in the domestic politics of every American state. Can one imagine without dread this country embarked upon such a sea of adventure? The Monroe Doctrine, a doctrine of non-interference on the part of European states in this continent, would be changed into a license to interfere on our own part. Place the burden of responsibilities involved in such a position upon our government, contrast with this the heavy cost, the empty glory, the nature of the return,—a harvest of dislike, distrust, commercial jealousy, and discrimination,—what has the political headship of this continent to offer in compensation?

Are not those words of Washington, uttered then with reference to European powers and European influence, still applicable, not objectively,—for we have outgrown the possibility of fear,—but subjectively: “Against the insidious wiles of foreign influence (I conjure you to believe me, fellow-citizens) the jealousy of a free people ought to be constantly awake; since history and experience prove that foreign influence is one of the most baneful foes of republican government. . . . The great rule of conduct for

us in regard to foreign nations is, in extending our commercial relations, to have with them as little political connection as possible"? Let us look to it that we do not reverse this wise counsel.

THE FISHERY QUESTION

NORTH AMERICAN REVIEW,
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THIS article was published in the "North American Review" as long ago as 1886. The reciprocity agreement criticized in it has never been revived. Nor has any permanent settlement of this old difficulty been arrived at. The article is reprinted here because it is believed that its conclusions are as applicable now as then, and that the present *entente* between Great Britain and the United States might render a settlement possible.

THE FISHERY QUESTION

ONCE more, for the seventh time since our history as a nation began, the fishery question is before us for solution. In 1783 the first grant of fishing privileges in Canadian waters was secured, though not without endangering the treaty of peace with Great Britain. After the War of 1812 it was found impossible to obtain the revival of these privileges, and it was not until 1818 that our fishery relations with Great Britain were put on a permanent footing. By the treaty of 1818 the United States consented to a very serious limitation of the rights which it had formerly enjoyed.

Between 1836 and 1851 came the movement of the provinces to limit the concessions of the treaty of 1818 by a new construction of the three-mile limit, and the passage of certain harassing laws by their legislatures.

In 1854 the reciprocity treaty was signed, which gave our fishermen the right to fish

in waters previously closed to them, but at the price of free entry of Canadian lumber, fish, and certain other products. This arrangement was allowed to terminate in 1865, and six years later, in 1871, came a new form of reciprocity under the treaty of Washington, the same treaty which provided for the settlement of the *Alabama* claims. This granted free fishing on the one side and the free entry of fish on the other, but with a provision for striking a balance between the money values of the privileges which each country had received.

In midsummer last, this, in turn, expired, and after consenting to a temporary extension of the treaty to avoid breaking in upon the fishing season, the administration is now face to face with the fishery question once more.

Is a permanent solution practicable?

For a long time past it has been the policy of maritime states to build up their fisheries in various ways. They were a useful industry, furnishing a cheap and valuable food product, and forming a convenient reservoir for seamen in case of war. Thus, by the comity of states, coast fishermen have long been exempted from the operations of naval warfare, from the capture and condemnation as enemy's property to which even yet the mercantile marine is subject. This policy

the United States has imitated. Until 1854 it has consistently tried to protect and foster the coast fisheries at the national expense. In the treaty of 1783, for example, the free navigation of the Mississippi was granted as an equivalent for the right to fish in provincial waters. In 1799 a bounty of thirty cents per barrel was granted on all exports of pickled fish. In 1813 the cod-fishermen received a tonnage bounty under conditions. For bankers of over thirty tons this was four dollars per ton. In 1819 this was increased for smaller craft, and in 1846 a duty of twenty per cent. *ad valorem* was laid on all imports of fish. Finally, in one of the protocols to the treaty of Washington, a million dollars were offered for the right to fish in Canadian waters, not otherwise opened, in perpetuity. Under the stimulus of these bounties and duties the tonnage employed in the coast fisheries rapidly increased. On the whole, the thirty or forty years following 1818 were prosperous ones for New England fishermen, in spite of somewhat frequent collisions between them and the provincial officials. Our fishermen were often tempted to smuggle; they could not be always kept from fishing in waters not opened to them by treaty; serious misunderstanding arose over the three-mile limit inside which they could not fish, and how it

was to be measured. Many American smacks were seized on suspicion, some confiscated, some rescued by their crews, some discharged, but without chance of damages for illegal detention. Both parties to the treaty grew dissatisfied, a new arrangement was desired, and the treaty of 1854 was the result. Then, for the first time, our fishermen paid for enlarged fishery rights, as it were, out of their own pockets. For, though they had a wider range for their fishing, they lost the protected market for their fish. More than this, the reciprocity treaty built up formidable competition in Canadian waters. Under the old system the provincial fishermen were in bondage to the traders who supplied their outfits. But, soon, with the American market for their catch, and with a demand on the spot for their provisions, bait, wood, and other articles, they were able to own their boats. We are now told that, under the similar working of the 1871 arrangement, they are outgrowing their boats, and own many fishing-smacks. The treaty of 1854 seems to have been allowed to expire at the wish of our fishermen. Probably the immediate effects of the reciprocity treaty outweighed in their minds the possible evils of a return to the basis of the treaty of 1818. For the next four years an experiment was tried by the Canadian gov-

ernment. A license of so much per ton was charged American smacks, which opened to them the whole inshore fisheries of the provinces. This was fifty cents the first year, one dollar the next, and two dollars after that. Under the two-dollar arrangement the fourth year but twenty-five vessels were licensed. As the smacks were from fifty to eighty tons burden, this indicates that our fishermen, about 1870, did not consider the Canadian inshore fisheries worth an average of one hundred and fifty dollars apiece to them.

When the license system failed, the provinces prepared to enforce the rigor of the law; but a new agreement was at hand, and the home government moderated their zeal. The new reciprocity treaty of Washington, with its results, is still fresh in our minds.

The most unaccountable and unjust decision of the Halifax Commission awarded a sum of five and one half millions as the excess of value of the privileges enjoyed by the United States over those granted to Great Britain, in spite of the fact that the entire market value of all fish taken by our fishermen, during the term of the treaty, in treaty-opened waters, did not equal this sum. This again showed the willingness of the government to aid its fishing interests at the national expense. In fact, except during the

first reciprocity treaty, the government has consistently pursued the policy of encouraging the fishing industries in the Northeast at the public cost.

An important question now presents itself. Under the working of the reciprocity treaties how have our fishermen fared? As matters are at present situated, are they right in wishing to discontinue all reciprocity arrangements—to return to the basis of the treaty of 1818? And what are their rights under the treaty of 1818? This treaty is by its terms perpetual, and is the foundation upon which all other agreements have been built. It granted the right to fish along the northern, the western, and part of the southern coasts of Newfoundland; off the Labrador coast from Anticosti indefinitely northward, and along the shores of the Magdalen Islands. For shelter and the purchase of wood and water only were American fishermen to have access elsewhere. Certain rights of landing and drying fish were also granted, but these are no longer valuable, as fish are now differently cured and handled. Besides this they have, of course, the high-sea fisheries, which are free to all men, and which include the greater portion of the cod and halibut and two thirds of the mackerel catch. Some few herring have been caught off Grand Manan, some codfish bait, like

caplin, in the bays of Newfoundland, and a few cod and halibut there and in other places.

But it is principally the inshore mackerel-fishing in the autumn along the coasts of Nova Scotia, New Brunswick, and Canada, that the reciprocity treaties have opened to us. This was once of considerable value. The mackerel-men met the incoming shoals off the Atlantic coast from New Jersey to the capes, in the spring. A little later they followed them up to Block Island, Cape Cod, and the Massachusetts Bay. The Maine coast was a favorite ground, and many vessels went no farther eastward. But the majority sailed past the Nova Scotia coast, through the Gut of Canso, and spent the late summer in the Bay of St. Lawrence, fishing broad. Not until autumn did they avail themselves of the treaty-opened waters, particularly in the bight of the bay of Prince Edward Island and off Margaree, where mackerel were found close in, in large quantities.

But now two things have combined to make this late inshore mackerel-fishing of little value. For a number of years, after 1876, the mackerel seem to have deserted those waters. They are a capricious fish, very uncertain in their appearance and movements, sometimes swarming in vast numbers along certain coasts, and then for

years deserting them almost altogether. Now they are frequenting the Bay of St. Lawrence again, but during 1878, 1879, 1880, and 1881 the bay fishing was a failure. And, secondly, the introduction of the purse-seine has completely changed the fishermen's program. All attempts to use the purse-seine in the gulfs have proved failures, with few exceptions, so that, since 1870, our mackerelmen have confined their operations more and more to our own shores.

In 1873, 254 fishing-vessels caught 77,011 barrels of packed mackerel in Canadian waters, of which 25,670 came from within the three-mile limit. In 1877, 60 vessels caught 7319 barrels, and in 1882, one vessel caught 275 barrels, of which not over 100 barrels came from waters opened by the reciprocity treaty. The value of these 100 barrels was a few hundred dollars; the amount paid for the privilege of catching them, \$458,333, besides the remission of duty at one cent per pound on many million pounds of Canadian fish. These striking figures¹ prove how little use our fishermen make of the privileges bought for them by the treaty of Washington. They show sufficiently one reason why they believe a further resort to reciprocity undesirable. But, in their view,

¹ "Report of United States Fish Commission, 1881," p. 520.

there is another and a stronger reason. The remission of duty on Canadian fish has built up a powerful competition in the provinces, and lowers the profits on their own catch.

In 1869, during the interval between the reciprocity treaties, the "Halifax Chronicle" said: "From the making of the reciprocity treaty until the abrogation, Nova Scotia increased in wealth and population at a most extraordinary rate; from its abrogation until the present, we have retrograded with the most frightful rapidity. Want of a good market has depreciated the value of our coal-mines, has nearly pauperized our fishermen, farmers, and miners; and should this want not be supplied in the only way it can be, by a new treaty with the United States, Nova Scotia will in five years be one of the least desirable countries to live in on this continent."¹

Between 1850 and 1870, for example, the settlements along the Gut of Canso were greatly prospered; the small traders made their fortunes; the farmer-fishermen flourished. When, owing to the introduction of the purse-seine, Americans no longer resorted there, the settlements became deserted. The traders moved away, and the wharves are rotting down. This is a single illustration of the value to the provinces of the American

¹ Quoted in Cape Ann "Advertiser" of July 2, 1869.

trade at their own doors, and of the free American market for their fish. Their mackerel-fishery was created by the treaty of 1854, and since 1873 their exports of pickled mackerel to the United States have averaged 75,000 barrels, about one quarter of our entire consumption. Their fishing capital in boats and vessels, their enterprise, and their power of competition, have all largely increased in the mackerel and in other fisheries.

The articles in provincial newspapers, the speeches of Canadian politicians, the demands of their diplomacy, all prove the same thing—the vast importance to them of a free American market for fish. That Canadian competition and the removal of the duty lowered the price of fish and the profits of our fishermen hardly needs demonstration. Canadian competition means larger imports: shortly after the treaty of 1871 took effect, one quarter larger; in 1880 more than twice as large as the average during the interval between the reciprocity treaties when duty was on. This larger supply means lower prices than would otherwise have obtained.

The remission of a duty of one cent per pound also lowers prices; not by one cent, but by a fraction of a cent, according to the amount imported. Mackerel averaged fifty-five cents per barrel lower during the reci-

procity treaties than during the interval between them.¹ In view of facts such as these, can there be any reasonable doubt that, with the fisheries conducted as at present, reciprocity inflicts a serious pecuniary damage upon our fishing industries? Can there be any doubt that the Canadians are deriving great profit from it? Our fishermen naturally protest against the renewal of a reciprocity arrangement. The Canadian fishermen are eagerly desirous of one.

Now, does it follow from all this that no fishery arrangement with Great Britain is desirable? Can we simply fall back upon the treaty of 1818, and declare that we want nothing more? I do not think so.

The uncertain nature and habits of the mackerel have been already alluded to. They have completely deserted the Bay of Fundy. For years they were scarce throughout the whole Gulf of Newfoundland; meanwhile they became plentiful off the coast of Maine. But no one can predict how long this state of things will continue. In a few years the situation may be entirely changed. The mackerel may abandon our own shores and swarm again in the gulf. Already they are growing more plentiful there. Five years hence our fishermen may clamor for the privileges which they now despise. And,

¹ Documents, Halifax Commission Award.

again, there are signs that the purse-seine may be discarded. The mackerel-men may return to the old-fashioned hook-fishing, or to jigging. The purse-seine is vastly destructive of fish, large and small of all qualities being captured together. Not a year has gone by since 1870 without protests against its use. Thus, in 1878, a delegation of fishermen from Portland and Gloucester went to Washington to secure the passage of a law prohibiting the use of the purse-seine in the mackerel-fishery. If this should take place, we must again resort to Canadian waters, for hook-fishing works there better than on our own coast.

What *does* follow is that reciprocity is no longer wise or admissible. It is reciprocity only in name. What we grant the Canadians is of constant and great value. What they grant us is of fluctuating and doubtful value. This, then, is the point upon which I should insist: that free fishing and the free entry of fish should no longer be coupled together. They have no necessary relation. The one was taken simply as the most convenient diplomatic equivalent for the other. With our present knowledge, to balance one against the other is a pure speculation, and likely to be a losing one. Let each question be argued on its own merits. Shall we secure the opening of all Canadian waters for our fisher-

men? I believe that a wise and statesmanlike foresight demands this. Nothing is more foolish than to argue that, because we do not need it now, we shall never need it. A change in the habits of the fish, or a change in the methods of the fishermen, would make it indispensable; and both are possible. If we rely on the treaty of 1818 alone, when our smacks resort again to the gulf we shall at once have a repetition of the difficulties and controversies which marked the old order of things. Arbitrary arrests; armed resistance; the question of the three-mile limit; the right to navigate the Gut of Canso; the right of transshipment; bitter feeling; cruisers confronting one another; unpleasant diplomatic struggles—all these rise up from the past to witness against it. How shall we secure the opening of Canadian waters? I reply, *by the payment of a lump sum for the right to fish in perpetuity*. This was tried in 1871. It is in accordance with the precedents of our past history. It would open forever privileges which may become of very great value. It would solve the fishery question finally. It would heal a long-open sore. This is a good time to buy, when what our neighbors have to sell seems worthless. They need the trade of our fishermen. It is a wise policy for them to encourage this without equivalent. They could well afford to open to us

their waters simply for the traffic our vessels would bring. Matters have changed since 1871. The refusal of a million for this privilege then does not imply the refusal of half that sum now.

With all waters opened to our fishermen, they can compete on favorable terms with all rivals, and enable us to approach our second inquiry with less restraint.

Hitherto we have regarded solely the interests of our fisheries. When we ask if a duty shall be laid on foreign fish, however, it affects the nation at large. This is purely an internal question, and our inquiry might properly end here. But the statement of this second question may be of interest. It is this: Shall we protect the fishermen's market by a duty on all foreign fish, and raise the average value of their catch at the expense of the fish-eating population? This is a tax on the food of the poor. It is not a heavy tax. Duty-free, Canadian imports of fish bear a comparatively small proportion to our whole consumption: of mackerel, one fourth; of other fish, less. Our lake fisheries, and those along the southern coast, are growing, free from competition. The consumption of fresh fish has largely increased, owing to quicker transportation and better packing, so that salted fish is

relatively less valuable. This modifies, but does not change, the question.

Having bought for our fishermen enlarged fishery rights, is it necessary to maintain for them a protected market? The conditions of this problem may change, and, if we leave ourselves free, we may change our policy from time to time, but may leave it a purely internal question. But with reciprocity—giving free entry of fish for the free rights of fishing—we make it an affair of foreign policy; we give up our liberty of action, and tie our hands for years.

THE BERING SEA AWARD

YALE LAW JOURNAL,
1894

THE BERING SEA AWARD

DURING the year 1893 one more instance was added to a list already considerable and honorable, of disputes successfully settled by special arbitration on the part of Great Britain and the United States. The award of the commission, to which the settlement of five questions relating to the sealing controversy was referred, was made in August. It may be of interest to attempt very briefly to state what was and what was not decided by this award, and to characterize the policy of our government and the arguments of our counsel in view of it.

The facts agreed upon between the parties were that the fur-seal was largely diminished in numbers and seemed threatened with extinction. But there existed an irreconcilable difference of opinion as to the cause of this, the experts of the United States, most of them, holding that pelagic slaughter was accountable for it, while those

of Great Britain maintained that these unhappy results sprang from the unscientific methods of killing on the Pribyloff Islands practised by the licensees. The question at issue was this: Has the United States acquired, either through an exclusive jurisdiction over the waters of the Bering Sea or through a property right in seals breeding there, the right to protect them in the open sea by force, or must such protection spring from the joint action of the two governments? And if the latter is true, what regulations are necessary to accomplish the purpose? The fact that Great Britain was willing to join in the reference of this latter question is an important one. It indicated clearly, what she had maintained throughout, though not always with sufficient energy to overcome the hampering influences of the British colonies on this continent, that she desired to preserve the seals from threatened extinction, that the real question was one of method, but that she objected to the assertion of exclusive right in the matter by the United States. This fact should be taken as the key to her policy. It certainly made the task of our government simpler, and, as may appear later, its second policy of doubtful expediency.

With this preface let us see what the actual award was.

In the first place, it decided that, though the United States succeeded to all the rights of Russia in Alaska, its islands and waters, as acquired by the Seward purchase of 1867, exclusive jurisdiction over the Bering Sea, outside of a coast sea stretching a cannon-shot from land, was not one of them. In this all the arbitrators concurred save one, Senator Morgan.

Again, the same arbitrators decided that Great Britain had never recognized an exclusive jurisdiction on the part of Russia over the seal-fisheries in the Bering Sea outside of the usual territorial waters.

Thirdly, it decided unanimously that the Bering Sea, as mentioned in the treaty of 1825 (between Great Britain and Russia), formed part of the Pacific Ocean.

And, lastly, it decided, the United States arbitrators both dissenting, that this country has "no right to the protection of a property in the seals frequenting its islands in the Bering Sea, when the same are found outside the ordinary three-mile limit." Thus the claim of the United States to an exclusive right to protect the Pribyloff seals at sea, whether arising from jurisdiction or from ownership, was denied.

Proceeding now to the regulations for their protection, made necessary by this denial of the right of our country alone to

deal with the subject, the arbitrators, by a vote of four to three, the Canadian and both American members dissenting, laid down the following scheme :

Sealing shall never be carried on within sixty geographical miles of the Pribyloff Islands.

Within the Bering Sea, excluding this sixty-mile zone, and over a wide stretch of the North Pacific Ocean (north of the latitude of Port Harford in southern California, and east of the one hundred and eightieth degree of longitude), sealing shall be allowed on these conditions only : by sailing-vessels ; under special license ; carrying a distinguishing flag ; from August 1 to May 1 ; using neither nets, guns, nor explosives ; with provision for reporting number and sex of the take, and date and place of capture ; and with vague regulation of the fitness of the crews. From these regulations the Indians were exempted under certain conditions.

Subject to revision after five years, these rules will govern the action of the two powers until they agree to abolish or modify them. Whether they are fitted to secure their object, the preservation of the fur-seal, the sequel only can show. Doubtless in part they are difficult of determination, *e. g.*, the position of the sixty-mile limit in foggy weather ; and

in part they may prove easy to evade. Their close season is rather short, but they cover very much more water than the mere Bering Sea. Much good may fairly be hoped for from them.

One or two points in the controversy were not decided. Though suggesting the total stoppage of sealing on land and sea for two or three years by both governments, this was not insisted upon.

The liability of the United States for damages on account of the captured sealers seems clear from this award, but no sum of damages was assessed. This will require future negotiation. It will be interesting to see whether indirect damages for increased insurance and for loss of prospective earnings will be claimed, as in the *Alabama* cases. For damages on the score of loss of prospective earnings during the pendency of the arbitration proceedings, the treaty of April 18, 1892, which renewed the *modus vivendi*, itself provides. It must be remembered that the freedom of the seas is upheld, so that subjects of third states are not debarred from hunting seals in any manner they may choose. Perhaps Russia and Japan and Mexico, France and Germany, may be persuaded to accede to these rules. Otherwise there may be similar trouble with their subjects, or a transfer of sealing-vessels to their

flags. To include them was Mr. Bayard's intention in the negotiation undertaken near the close of the first Cleveland administration, and Russia had signified her assent.

This leads us to notice how completely the outcome of the whole matter proves to be on the lines then followed. Canada blocked the way, but surely it would have been wiser to persist in trying to secure what was wanted by further negotiation, rather than to try threats and force, to assume a position which has since proved, and which might have been seen to be, untenable. This mistaken line of action has resulted in further destruction of seal life, in the incurring of considerable liability for seizures, and in a good deal of unnecessary friction.

Little stress was laid in the argument of our counsel upon the claim to jurisdiction over the Bering Sea. This was found untenable ground. But the claim to a property right in the Pribyloff seals after their departure from the islands was strongly and ingeniously urged. Here was an animal, whose skin is the basis of a considerable industry, with well-defined habits attaching it to a certain portion of the United States soil, putting to sea for the major part of the year, but always with the intention of returning. On land, the bearing, breeding, and nursing processes were regulated and protected by a beneficent gov-

ernment. The killing process, which also awaited a part of the herd, was properly restricted. A property right in the seals existed at the islands; it did not lapse when they put to sea, but, like the ownership of pigeons in the air, of deer escaped from a preserve, of bees away from their hives, must be held to survive. The only practical alternative was extinction. The freedom of the seas for most purposes, of course, was admitted to exist; but when in conflict with a case like the present, the laws of humanity, of self-defense, of state necessity, must be paramount. There were thus philosophical arguments as to the nature of property in seals, and a strong humanitarian plea for their preservation. A precedent for extraordinary jurisdiction over a portion of the high seas was found in the British regulation of the pearl-oyster fishery in Australasia.

The counter-arguments of the British counsel were directed mainly to prove legally and historically a lack of jurisdiction over the Bering Sea vesting in the United States.

One may be allowed to say that the property claim was more subtle and ingenious than sound. It was novel, being for the first time applied to a free-swimming animal. Moreover, it does not seem to carry with it as a corollary the right to protect by force

against the acts of subjects of other states, in violation of other and better-established principles—the freedom of the high seas, and the immunity from search in time of peace. It furnishes a powerful plea for the protection of seal life, rather than legal proof that one country has the right to undertake this desirable work single-handed.

In view of the award, a property right in the seal at sea must be declared non-existent. The issue is likely to be happier for its failure to be established. Such an inroad upon the broad principle of a free high sea, which this country has been foremost in maintaining, would have been regrettable, and might have led to other and more serious trouble.

THE PRESIDENT'S MONROE
DOCTRINE

THE FORUM,
FEBRUARY, 1896

THE PRESIDENT'S MONROE DOCTRINE

AMONG the fundamental rights of every state is that of independence. Now, independence means the right to be let alone. In the exercise of its independence each state deals with every other as it sees fit: it fosters trade or restricts it; it quarrels or it makes friends. This is the rule; interference in the affairs of another state is the exception, and needs to be justified. The necessity of self-defense is the most common excuse for such interference. The balance-of-power principle was based upon this, with the maintenance of the Ottoman Empire and the Triple Alliance as its latest manifestations. Intervention to preserve the peace of Europe—such as that which carved a neutral Belgium out of the kingdom of the Netherlands—was based upon this. And it was this which called the Monroe Doctrine into being. Let us fix firmly in our minds at the outset, then, the undoubted fact that the declaration of

President Monroe was an interference in the affairs of other states, to be justified only by the necessity of self-defense.

A new instance of interference in the affairs of other states has occurred. President Cleveland, in his message to Congress of December 17, 1895, declares that he conceives it to be his duty to ascertain and lay down a boundary-line between British Guiana and Venezuela, using every means in his power to enforce it. This, of course, is a threat of war. For this interference the President states that the Monroe Doctrine is his warrant. He believes that doctrine applicable to the case in question, and a failure to enforce it dangerous to our safety.

Before taking up this question of applicability, however, there are several statements in the message which invite comment and criticism, bearing strongly, as they do, upon the President's general position and argument. He says: "It may not be amiss to suggest that the doctrine upon which we stand is strong and sound, because its enforcement is important to our peace and safety as a nation, and is essential to the integrity of our free institutions and the tranquil maintenance of our distinctive form of government."

Here he clearly puts the question of enforcing the Monroe Doctrine in the Vene-

zuelan boundary dispute upon the proper ground—the self-interest of the United States. We are to enforce it—supposing it to be applicable—because it is to our advantage to do so; because to neglect it would endanger our peace and safety, our free institutions and form of government. He bases his fresh use of the old doctrine on the original ground, that of self-defense. That this danger, which justifies our interference, really exists, I find it very hard to believe. It may well be asked whether our peace is most threatened by an unsettled boundary in South America, or by the message itself. This question of our self-interest will be referred to later. What I wish to call attention to here is that the President admits that his action is based upon utility, not upon duty. And yet this warrant alone does not seem to satisfy him. He wants legal justification. Accordingly, he argues that, though not perhaps “admitted in so many words to the code of international law,” the doctrine is yet a part of it, “since in international councils every nation is entitled to rights belonging to it; and when the United States is a suitor before the high tribunal that administers international law, the question to determine is whether or not we present claims which the justice of that code of law can find to be right and valid.”

This is principally rhetoric. There is, of course, no "high tribunal," no "code of international law," except in a metaphorical sense. If the passage means anything—which is uncertain—it means that the Monroe Doctrine is a part of the body of international law because it is in harmony with its ideas of justice. This is an error. The rules of international law are founded upon the principles of natural justice, but everything consonant with its ideas of justice is not a rule of international law. The punishment of the slave-trade as piracy—a just rule, and one laid down in many treaties—is a case in point. It is not a rule of international law, because it has never been made such by the common consent or agreement of nations. Even were the premise sound, the conclusion would therefore be false. In this contention the President has been led away by Lord Salisbury, and tries (and fails) to prove what is not necessary to his position—that the Monroe Doctrine is a part of the body of that law which governs the relations of states. It is a *policy*, not a *law*, either national or international, and its application to each specific case—granting that action is justifiable at all—must be argued on grounds of policy alone.

"The Monroe Doctrine finds its recognition in the principles of international law, which

are based upon the theory that every nation shall have its rights protected and its just claims enforced."

Is it necessary to remark that there is no such theory? Every state has the right of self-defense. That is the first law of nations. But to say that every state has a right to be protected and to have its just claims enforced by some other state is simply ridiculous. No; it is more—it is monstrous. It is a plea for universal tranquillity at the expense of universal interference and disturbance. It is a plea in behalf of the *status quo* of the world, while inconsistently it threatens to disturb that status by enforcing the just claims of some states against others. The justice of the claim, it is natural to infer, will be decided by an *ex-parte* commission.

There are other statements which are equally faulty,—as where it is said that the doctrine was intended to apply to every stage of our national life, which is something that neither the President nor we can know,—but I pass to the final sentence.

While deprecating the idea of war—a war which no one dreamed of until the message threatened it—the President exclaims: "There is no calamity which a great nation can invite which equals that which follows a supine submission to wrong and injustice, and the consequent loss of national self-

respect and honor, beneath which are shielded and defended a people's safety and greatness."

Here is a complete mixing up of two persons: the one submitting to injustice, namely, Venezuela; and the one losing its self-respect, that is, ourselves. Or does the President mean that we have a divine mission to follow Great Britain or any other state around and check its aggressions? Does he mean that we are knights errant, in search of wrongs to right, of injustice to repel, under penalty of losing our safety and greatness? Whichever version we adopt,—whether we merge our individuality in that of Venezuela, or tilt at windmills like Don Quixote,—it may be questioned if our safety and greatness are thus best preserved.

This is more than mere dialectics. The President has threatened Great Britain with war in a certain contingency; he has thrown business already into great confusion, and jeopardized the nation's finances, on the ground that our Monroe Doctrine is a binding law, is necessary to the safety of our institutions and form of government, and is applicable to the Venezuelan boundary dispute. If these contentions cannot be maintained, his action must be condemned as an offense to a friendly power, and a very serious blunder.

His argument for the applicability of the Monroe Doctrine is entitled to fair consideration and is a principal point at issue. It is as follows:

Speaking of the allied powers, Austria, Prussia, Russia, and France (England having withdrawn), President Monroe said that "we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. . . . We could not view any interposition for the purpose of oppressing them [that is, the South American republics whose independence we had recognized] or controlling in any other manner their destiny, by any European power, in any other light than as the manifestation of an unfriendly disposition toward the United States."

The President, with these words in mind, says: "If a European power, by an extension of its boundaries, takes possession of the territory of one of our neighboring republics, against its will and in derogation of its rights, it is difficult to see why to that extent such European power does not thereby attempt to extend its system of government to that portion of this continent which is thus taken. This is the precise action which President Monroe declared to be 'dangerous to our peace and safety,' and it can make no difference whether the European system is

extended by an advance of frontier or otherwise."

The argument is perfectly clear and needs no elaboration. An unsettled boundary dispute between a British colony and Venezuela, a disposition to "edge up" on the latter in the matter of territory, is an attempt to extend the European system to a sister republic and to control its destiny. On the face of it this is a possible inference, but only by emphasizing the letter—not the spirit and real intent—of Monroe's message, and by almost a perversion of words. Apply the same language to our Maine boundary. The valley of the St. John was disputed ground. By the Ashburton compromise it was divided between the disputants. Is it a proper use of language to say that the success of Great Britain in acquiring the country north of the St. John River to the St. Lawrence watershed, which we had justly claimed, "extends a European system to the United States, or controls its destiny"? Venezuela's is a perfectly parallel case. Were she to lose the whole region in dispute by arbitration or by aggression, in neither case would a new system be extended over her, or her destiny be controlled.

But let us look at the real spirit and intent of the Monroe Doctrine. One hesitates to repeat its origin, so often has it been related.

The allied powers had twice tried their hand at intervention—in Spain and in Naples. This intervention was in favor of absolutism, not of established government; for in Naples a liberal movement was put down, in Spain a royalist insurrection was helped up. Emboldened by success, they then proposed to apply their new principles to this continent, and to restore to Spain those colonies of hers which were trying to gain or had gained their independence. Then Monroe declared that such intervention would be regarded by the United States as dangerous to itself. He announced a policy. That policy forbade the substitution of monarchical for republican forms of government on this continent by European force. It did not forbid the existence of monarchies here, as Dom Pedro could testify. It did not forbid any step which the republics themselves chose to take, but simply what was forced upon them. It was the policy which fitted the hour and the occasion. It was opportunism. This is shown by the sequel. When Clay, in January, 1824, proposed, in moderate language, a legislative resolution embodying the President's doctrine, no action was taken upon it. As the latest authority, Professor Snow,¹ well says: "The attempt to give a permanent character to the Monroe Doc-

¹ "American Diplomacy," p. 294.

trine failed. It would appear that Congress, considering the danger past, did not approve of adopting a general policy of this kind in the absence of specific cause."

In 1826 came the Panama Congress. A league of states was proposed, which, among other things, was "to take into consideration the means of making effectual the declaration of the President of the United States respecting any ulterior design of a foreign power to colonize any portion of this continent, and also the means of resisting all interference from abroad with the domestic concerns of the American governments."

After much debate and delay, delegates were appointed from the United States. They never left this country, and the congress amounted to nothing. Mr. Dana, in his edition of Wheaton's "Elements of International Law," comments upon it as follows: "It seemed to aim at introducing, in behalf of republicanism, the same principle of interference which had been attempted abroad in behalf of despotism."

In 1848, Yucatan, in the throes of internal conflict, offered its dominion to the United States, to Spain, and to Great Britain. President Polk urged Congress to prevent its transfer to any European power as a colony, and to reaffirm the Monroe Doctrine. Calhoun was a member of Monroe's cabinet in

1823. He was in a position to know what the Monroe declarations meant and to what they were applicable. Speaking in opposition to Polk's suggestion, he said: "They were but declarations—nothing more; . . . we are not to have quoted on us, on every occasion, general declarations to which any and every meaning may be attached." And, again, he argued that the doctrine must be limited by the conditions under which it was spoken, else "it would have involved the absurdity of asserting that the attempt of any European state to extend its system of government to this continent, the smallest as well as the greatest, would endanger the peace and safety of our country." The declaration, then, according to Calhoun, was a policy only, to be followed or not, as interest dictated, and was based upon the right of self-defense and nothing else.

We approach now the Mexican adventure of Maximilian. By the power of French bayonets Napoleon III overturned the republic, and had that Austrian prince chosen emperor by a travesty of an election; in short, he committed exactly those aggressions from which the Monroe Doctrine warned foreigners away. It was a genuine case of self-defense on the part of the United States, for the French action was really taken to check the growth of our commerce

and influence in that quarter. A demonstration of force was proper, since the offensive act had been already consummated. The hands of our government having been tied during the Civil War, after the close of that struggle a force was moved to the Mexican border. The French support was withdrawn, and Maximilian fell. Thus was the Monroe Doctrine reapplied on its original lines. This episode proves two things: first, that the principles announced by President Monroe were not obsolete in 1867, and are presumably still our guidance; second, that the doctrine, forty years after its birth, had met with no enlargement.

Mr. Seward, in a despatch to Mr. Kilpatrick in 1866, gives his idea of the Monroe Doctrine thus (I quote from the United States "Digest of International Law," by Wharton, the official collection of the government): "The government of the United States will maintain and insist, with all the decision and energy which are compatible with an existing neutrality, that the republican system which is accepted by any one of those [South American] states shall not be wantonly assailed, and that it shall not be subverted as an end of a lawful war by European powers; but beyond this position it will not go, nor will it consider itself bound to take part in wars in which a South

American republic may enter with a European sovereign, when the object of the latter is not the establishment, in place of a subverted republic, of a monarchy under a European prince."

This history and these comments sufficiently show that it was the substitution of a monarchical for a republican form of government, by European forces, at which the Monroe Doctrine was aimed. President Woolsey¹ concludes his treatment of the subject with this most applicable sentence: "To lay down the principle that the acquisition of territory on this continent by any European power cannot be allowed by the United States would go far beyond any measures dictated by the system of the balance of power; for the rule of self-preservation is not applicable in our case—we fear no neighbors. . . . But to resist attempts of European powers to alter the constitutions of states on this side of the water is a wise and just opposition to interference. Anything beyond this justifies the system which absolute governments have initiated for the suppression of revolutions by main force."

Such *was* the Monroe Doctrine. Anything other than this is the doctrine of somebody else.

¹ "Introduction to the Study of International Law," 6th ed., p. 56.

There is another striking difference between the old version and the new. President Monroe's message nowhere threatens force. This fact has been often commented upon. His strongest expression is that we should look upon certain actions as evidence of an unfriendly disposition. But President Cleveland is not so tame. After suggesting a commission to report upon the Venezuelan boundary, he says: "When such report is made and accepted, it will, in my opinion, be the duty of the United States to resist by every means in its power, as a wilful aggression upon its rights and interests, the appropriation by Great Britain of any lands, or the exercise of governmental jurisdiction over any territory, which, after investigation, we have determined of right belong to Venezuela." But for this threat the message would have been regarded as a political manifesto; with this threat it is a menace to the peace of two great states.

There is one more consideration,—one already suggested,—the vital point of the whole matter. We may grant, though contrary to fact, that the Monroe Doctrine is applicable to the Venezuelan boundary dispute. Proof must still be furnished that a failure to enforce it would endanger our peace and safety. If they are not so endangered, we have no ground for interfer-

ence. The Monroe Doctrine declares this. President Cleveland implies it. The commentators who have been quoted say it. Does British control over the wild frontier region in dispute between Venezuela and Guiana really threaten the safety of the United States? If so, why and how? We are entitled to specifications. For, unless the danger can be shown, an interference is unwarranted. Does Canada put our institutions in jeopardy? Does British Columbia imperil our form of government? If not, why does this danger lurk in distant Guiana? England has as constitutional a form of government as our own. She is a good colonizer. She carries order, justice, capital, into the wilds with her. Are such developments inimical to our safety? Is there anything which can truly imperil our institutions or which we should truly fear, except the consequences of our own ignorance, our own dishonesty, our own conceit?

At the risk of tediousness, may I gather again the threads of my discourse? The Monroe Doctrine is not a law; it binds us to no action; it was a policy devised to meet a particular case. That case was the forcible substitution of monarchical for republican forms of government in American states by European action. It was an act of self-de-

fense, on no other ground justifiable. It was not backed by threats of force.

Mr. Cleveland's doctrine is an entirely distinct one. Under threats, it attempts to settle for them the disputed boundary-line of two friendly states. It virtually asserts the right to pass judgment upon any controversy over territory which an American state may have with a European one, and to enforce the decision. It is interference in the affairs of another state which the necessity of self-defense does not justify. It is a long and dangerous step toward that assumption of the headship of this continent which Mr. Olney so tersely describes when he says that the United States is "practically sovereign" throughout America, and that "its fiat is law." A glorious and happy future this, where the responsibilities are ours, the profit another's; where dreams of empire under the guise of a protectorate replace peaceful development; where our own will is our only law!

SOME THOUGHTS ON THE SETTLE-
MENT OF INTERNATIONAL
CONTROVERSIES

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SOME THOUGHTS ON THE SETTLEMENT OF INTERNATIONAL CONTROVERSIES

EVER since the early years of this century the British government has been attempting to secure a right to search foreign ships suspected of trading in slaves. Through diplomatic pressure, and even by direct purchase, many treaties have been negotiated for this purpose, and largely by this instrumentality the slave-trade on its old lines has been well-nigh abolished. This is a rare and remarkable, perhaps even a unique, instance of national humanitarianism. States are not altruistic. From the nature of their organization they cannot be. The object of a state's existence is to secure the greatest possible good for its own subjects, not for the subjects of another. We do not expect a business corporation, a college, or even a church, to prefer the welfare of a similar institution to its own. That

would be wrong as well as foolish; it would be a betrayal of trust. So it is with the state. In the present condition of human society, then, selfishness rather than altruism is the necessary and fundamental principle of the state.

Now, since each state will be reaching out for certain advantages for its subjects, it may often happen that two states at the same time grasp after the same advantage and thus come into conflict. Conflict is the law of state life and growth. It is as inevitable as a law of nature. But conflict, the striving after the same good, each for its own, does not mean war. In the early stages of human society it might have done so. Now, however, the restraining influences are numerous and intricate. They are of two general kinds, humanitarian and economic. A powerful deterrent is also found in the growth in importance of the neutral influence, which discourages war between its friends because it dislikes to have its trade disturbed. I need not enlarge upon these facts; they have come under the observation of all of us; I wish merely to bring into juxtaposition the inevitableness of collisions between states and the remoteness of war nevertheless, to show the great middle ground which we are to attempt to explore.

Where the Niagara River emerges from Lake Erie it is a broad and sluggish flood of waters almost imperceptibly flowing seaward. But after sixteen miles of gentle current there come two of tumultuous rapids and then the fall itself. This is a not inapt image of the march of events between the breaking out of an international difficulty and the catastrophe of war. The quiet flow of river typifies the diplomatic discussion of the dispute, long drawn out, perhaps, and devious, but there is safety in it all. At no point is the ship of state helpless in the grasp of the seething waters. The rapids are the type of measures of a different sort, which the publicists call preliminary to war. These are retorsion, the law of tit for tat, to punish particularly some legal discrimination; reprisals, the seizure of property of the offender or his subjects in order to make him realize his wrong and your own sense of it; and embargo, a form of retorsion, which, as we see in the events leading up to the War of 1812, may be laid either to exert pressure and remedy injustice or avowedly as a war measure. Even here, in the midst of the rapids, there are places and moments when safety is not impossible. Our good ship may hug the shore, the helmsman may realize his danger, and the final mad rush and deadly plunge be saved. The simile

must not be pushed too far, but it will answer to bring vividly before us the three steps of negotiation and amicable arrangement, of preliminary war measures, and of war itself. With one more subdivision, our topic lies before us. An amicable international settlement may be brought about through simple and direct negotiation, through the mediation of a third power, or through arbitration. Each method has its virtues. Neither one can be dispensed with. It is a mistake to emphasize one to the exclusion of the others. To insist upon a due estimate of the three, to beg you to preserve a proper proportion in your valuation of them, is my very earnest desire.

When two sensible men quarrel, if sensible men ever do quarrel, the best thing they can do is to get together and talk their difference over. In nine cases out of ten they can bring about a settlement. The claim is seen to be unfounded or is softened; the words or acts misunderstood become clear and harmless; friendly and rational views assert themselves. This typifies diplomatic agreement. Or, on the contrary, our disputants are suspicious and stubborn. Their quarrel is a misery to their neighbors. Presently a mutual friend begs them both to let him examine their difference and suggest a settlement. He is allowed to do so;

both are impressed by the good sense of his conclusions and agree to abide by them. That is mediation. The settlement is suggested, not asked for; it is recommendatory, not binding. Or, thirdly, and probably, this kindly neighbor will be asked to be good enough to go about his business, and the quarrel grows brisker, with a lawsuit in the background. But they are practical men and economical men. A five-hundred-dollar fee to litigate a fifty-dollar claim appeals to neither, confident though he is of the justice of his cause. In this frame of mind they chance to meet, and agree to refer their dispute to some other neighbor and to accept his judgment as final. That is arbitration. The submission is voluntary; the decision is final and binding.

But there is one remark to make if we would exhaust the possibilities. Should one of our disputants, in the passion of the moment, reflect upon the character of the other or threaten his person, up goes the latter's cane or fist, and the breach becomes a fight. So a nation resorts to arms to defend its honor or its national life.

This is a homely but a true simile of the differences of states and their settlement. Now, I believe it is accurate to say that the mediator in international, as in private, quarrels is apt to be shown the door. This

is but natural, for he suggests a settlement before the contestants have shown that they desire one. Mediation was unanimously agreed upon as a means of settling future difficulties by the signatories of the epoch-making declaration of Paris in 1856. They have fought one another since then, more often than they have mediated. The mediation suggested by Napoleon III in our Civil War was declined unheard. Our northeastern boundary dispute was referred to the arbitration of the King of the Netherlands in 1831. Instead of passing upon the question submitted, he dodged it and recommended a certain compromise line. This was virtual mediation; both parties declined it. Without multiplying examples, we may fairly say, then, that mediation has not proved, and is not likely to prove, a very useful instrument, and turn rather to the others described.

Here at the outset let me say, without hesitation and with all possible emphasis, that in diplomatic correspondence we have the simplest, the easiest, the most natural, the best way of settling international controversies. Whatever detracts from the proper working of this is mischievous. It is a quiet way. Many and many a question is raised, discussed, and settled without exciting the attention of Congress, the notice

of the newspapers, the passions of the people. How much better this is than to expose the moves of a state department to the daily inspection and criticism of the undiplomatic world! How much of national excitement, alarm, hatred, and all uncharitableness might have been saved these last few months, both in England and in America, if the Venezuelan and the Transvaal discussions had been confined to diplomatic channels in the good old way, instead of taking both publics into unusual confidence!

It is an effective way. Great victories have been neutralized by it, as in the Congress of Vienna in 1815. Important treaties have been negotiated by it; commerce has been doubled or cut off, boundaries laid down, nations founded, by it. The very successes of arbitration are largely ascribable to it. It was diplomacy that inserted the "three rules" in the treaty of Washington as the standard of neutral duties by which Great Britain agreed to be judged. These rules made the Geneva arbitration a success, but the British case a failure.

It is a friendly way. It is both melancholy and ludicrous to read the frequent criticisms, from certain sources, upon the conduct of our resident foreign ministers. If they dine out, and make pretty speeches afterward (grace after meat), they are "un-

American." If they observe punctiliously the forms of diplomatic society, they are "truckling to an aristocracy." If they observe ordinary judgment and common sense in their dealings, they are charged with "cowardice." If they fail to right the individual complaint offhand, they "lack sympathy." The ideal minister, in the eyes of such critics, is the noisy bully who carries a chip on his shoulder and has designs on the tail of that beast or bird which symbolizes the country of his residence. This is not a fancy sketch, and the existence of this ideal of conduct is most unfortunate. Ambassadors are the friendly representatives of their monarchs or executives, resident in a foreign state in order to cultivate and maintain peaceful relations with it.

Whatever interferes with their capacity for this makes them undesirable. When a man has an unfriendly feeling for another country, he is *persona non grata* to it; he is, moreover, useless to his own government. If a man be a boor in manners, a meddler in politics, disagreeable instead of affable in his personal relations, he cannot successfully carry out the object of his mission. When, as is the case with the United States, much of our diplomacy is carried on directly by the Department of State, this cultivation of international good will becomes the chief,

almost the sole, reason for the maintenance of a resident at a foreign court.

And, finally, it is a responsible way. Here is where the duty of adjusting foreign differences belongs. If capable of solution, in nine cases out of ten diplomacy can and will and does solve them. Such solutions stir up no feeling, create no war scares, leave no scar behind. They imply no international contest, while even so peaceful and satisfactory a method as arbitration does imply contest. It follows, therefore, as it seems to me, that our State Department and our diplomatic service and methods should be strengthened in every possible way. It should be a service, in fact, trained in law and language, based upon fitness and upon promotion from within, guided by experience, able to compare in character with that of any other country. It follows, also, that whatever tends to weaken the diplomatic method of settlement is to be deprecated. Here lies a valid objection to any permanent court of arbitration or even to any permanent arbitral system which will work without diplomatic adjustment. For, the moment such a court or system is created, the sense of responsibility of the diplomatic department will be lessened. This is inevitable, for responsibility is proportioned to the possession of power and the consequences of inaction.

When any minor question between states, at the instance of either, could be sent to a court for settlement, their departments of foreign affairs would take very little interest in effecting an earlier adjustment.

To strengthen the settlement by arbitration independent of diplomacy would therefore imply a weakening of the settlement by diplomacy. This is not to discredit the arbitration principle; it is only putting it in its proper place, locking hands with the diplomatic principle, and not trying to work independently of it.

What is the nature and what are the rules of international arbitration? This is our next inquiry. When the diplomatic representatives of two disputant states have failed to reach an agreement from within, they may call in outside aid. The question in dispute is accurately stated; the choice of arbitrators is made; their time and place of meeting, their form of award, the rules which shall govern them, are arranged for. Read any treaty which has created such a tribunal, and you will see how minutely it attempts to provide for every contingency. Where a detail is not thus laid down, it is governed by the rules of the Roman law. Thus if a unanimous award is not necessary under the treaty, a majority award is binding, because the Roman law so provides.

This very point came up in the Halifax fishery award.

Certain defects will vitiate the decision of a board of arbitration. If it fails to pass upon the exact questions submitted; if it is unintelligible; if it is impossible of execution or tainted with fraud—in all these cases the award is not binding.

It will be convenient here to sum up the arguments for arbitration as a means of settling international disputes, and the objections to it, as well.

It is a peaceful substitute for the very great evil of war. Taking a dispute out of the hands of interested parties who have failed to agree, it refers it to disinterested parties, so constituted that there *must* be an agreement. It has been tested, and it works. Under a definite agreement to arbitrate, rumors of war would cease, because the expectation of arbitration would take their place in men's minds. On the other hand, arbitration leaves a sting, a sense of being cheated, in the mind of the loser. It cannot settle *all* disputes, for those which involve the honor or the existence or the policy of the state are incapable of submission. This is almost universally admitted. A good illustration may be found in the Venezuelan imbroglio. The question of boundary between Great Britain and Venezuela is a

question of fact; it can be and should be arbitrated. The question whether the interests of the United States are seriously involved in an attempt by a European power to extend its territory in this hemisphere is a delicate, almost intangible, question of policy, and quite unsusceptible of settlement in this way.

Again, it is a surrender of the sovereignty of the state. This is not a serious thing where the end can be seen from the beginning. Where, however, a permanent system is entered upon, and whole classes of cases are to be tried in this way, it is a serious thing. It means that, unless a breach of faith is committed, the state has surrendered the right of war, one of the highest rights of sovereignty, even if a matter comes up which is deemed vital. Thus that first law of nations, as of individuals, the right of self-defense, is lost.

Comparing these considerations with one another, I think it is clear that arbitration is an expedient of the highest value for deciding certain questions between states, but one which must be used judiciously and under restrictions. Questions of fact, of damages,—speaking generally, questions of a business nature,—are suited to this kind of settlement, and these will largely outnumber the others. But just as it has been urged

that diplomatic methods of settlement should be improved by improving the machinery, so perhaps can the method by arbitration be bettered.

This brings us to the consideration of its scope and its details. These are the questions which fill men's minds to-day. When we speak of arbitration as it now exists, we mean the application of that principle to a single definite point, the decision to be made by a judge or body of judges appointed for the purpose. But when we dream of the arbitration of the future, we picture to ourselves a permanent court of unblemished character and the highest dignity, which shall be always ready to pass upon all questions submitted, and to which most questions shall be submitted.

I do not say that this is only a dream, but perhaps we do not realize the tremendous step from the one method to the other, and the very serious difficulties in the way. The believers in the new system generally make up their court out of an equal number of the highest judges of the nations engaging. Some believe that no further provision need be made for a tie vote; others would dissolve a tie by giving two votes to some one, perhaps to a judge of each nation alternately. But the plan depends upon a belief that nationality would be sunk, and that partizan-

ship would be triumphed over by the judicial instinct. A justice of the Supreme Court of the United States has testified to this belief. I do not believe that he knows the secrets of his own heart. When the Tilden election commission was chosen, certain of its members were drawn from the Supreme Court. Every member, every judge, voted according to his political bias. In the various *causes célèbres* of arbitration, in all vital points, the judges drawn from the nations involved have voted for their own cause and have been its most efficient pleaders. Many a question between Great Britain and this country has been referred to a joint commission, but that commission has rarely failed to divide, in matters of law and matters of fact, upon the lines of nationality. The idea of foreign judges does not seem to appeal to the advocates of this permanent court, but I believe such a make-up to be preferable.

And yet here, too, we find difficulties. We can perhaps answer for their impartiality at the outset, but who can guarantee the permanence of this quality, or of the friendship of their native states? A frequent result of arbitration is the belief that a certain member of the court has been unfair. In a special case, where the court has been immediately dissolved, this is bad

enough. But with a permanent court, where the dislike or distrust of the man might destroy confidence in all his subsequent decisions, it would be infinitely worse.

Besides such difficulties as these in the make-up of the court, there are other and weightier ones.

It must administer international law, with its many uncertainties, a law which has never been codified, and cannot be, in the present state of opinion, so diverse are the interpretations of the jurists and the political interests of different states. It is easy to say in reply that such a court would quickly frame its own code by interpretation and decision. It might attempt this, if the losing state permitted. But would not the novelty of a rule or its interpretation be a valid ground of appeal from the decision? The building up of a code would hardly be a consolation to the defeated litigant. Yet his condition of mind and will must never be lost sight of. For it must not be forgotten that the sanction of the court is to be found in the popular backing and approval of its actions. When its decisions have to be enforced by war, it is a failure. When its decisions do not command the confidence of both disputants, its usefulness is gone. We have not yet reached a golden age where love is law, where suspicion and selfishness

have fled away. This is by no means the whole case against a permanent court of arbitration. I am merely trying, somewhat disjointedly, to point out what a very violent change from the present usage it involves, and what serious objections there are to it.

But let us recur to a question already put, and ask whether the principle of arbitration cannot be enlarged, but in some other way, and without so largely dispensing as a permanent court would do with the diplomatic method. Cannot a permanent *system* of arbitration be devised, instead of a permanent *court*, which shall make constant use of diplomacy and avoid the difficulties described? In my opinion this is the true course to pursue. We have a system, or at least a usage, at present, which will work, which has rarely failed of success when tried, and which is, in truth, the basis for the current demand for something wider and better. Broaden and perfect the present usage, then, and retain in it the resources of diplomacy, rather than throw it away and jeopardize the arbitration principle by adopting a new and untried scheme. The time seems ripe for such an experiment as this. Let Great Britain and the United States define by treaty those classes of cases which they can safely submit to arbitration. As being only an experiment, the treaty arrangement

should be made for a limited time, say ten years, with extension thereafter in case neither state wishes to terminate it. Whenever a question under the treaty arises, provide that a certain interval shall elapse before further action is taken. If an agreement has not been reached within this time, bind the state departments of the two countries to refer the matter to a special board of arbitration, whose make-up and compensation, the conditions of its award, and the law applicable to that award, if need be, in case other than questions of fact are to be passed upon, shall be laid down through the channels of diplomacy.

Such a system as this preserves the voluntary element which is the distinctive mark of arbitration. By it the board can be adapted in its character to the nature of the question submitted. By it, too, the impartiality of the judges can be always more nearly preserved. We retain the possibility of settlement through diplomacy, but upon failure of this method within a reasonable time there succeeds the certainty of a trial by arbitration to check the outburst of popular passion and threatenings of war. So, too, we can test the wider development of arbitration, yet without undue danger of its breakdown. We can try in a single case a board made up of the judges of the highest

courts and determine its likelihood of impartiality, remembering, however, that such judges have but a mortal capacity for toil, and that their time is already fully occupied.

Such a plan I believe to have the possibility of success; a permanent court I believe would be doomed to failure. But let us never forget our sense of proportion. Put the power and the duty to settle international disputes where they belong, in the hands of the diplomatists, and strengthen those hands. Upon their failure try arbitration, and broaden, fortify, popularize arbitration. For those questions which involve the honor, the policy, the very existence of the state, reserve that supreme exercise of its sovereignty, the right of war. War is a tremendous waste, a crime against humanity, a great evil, but not the greatest of evils.

SOME COMMENT UPON THE
ARBITRATION TREATY

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SOME COMMENT UPON THE ARBITRATION TREATY

REDUCED to its simplest terms, the arbitration treaty which has been signed by representatives of Great Britain and the United States provides as follows:

There shall be created three tribunals. To one or more of these tribunals three classes of questions shall be referred.

The make-up of the tribunals, their jurisdiction, and the classes of questions to be submitted, may be seen in the table on the next page.

The objections commonly urged against any general arbitration agreement between states are of three sorts: (1) Those based upon the weakening in efficiency of the diplomatic methods of settlement; (2) those springing from the impossibility of submitting *all* questions to arbitral settlement; (3) those inherent in the make-up and working of the tribunal as ordinarily devised.

Let us examine these objections, and see

how the treaty laid before the Senate for consideration succeeds in meeting them.

Diplomacy is the natural, friendly, effective, and quiet method of settling international disputes. Whatever tends to weaken its efficiency is to be deplored. The presumption should always be that a difference will be arranged by diplomacy, not sub-

| | TRIBUNAL A. | TRIBUNAL B. | TRIBUNAL C. |
|---|--|--|--|
| QUESTIONS TO BE SUBMITTED. | Three members: one chosen by each state, with provision for choice of third. | Five members: two named by each state, with provision for choice of fifth. | Six members: three higher judges from each state. No provision for breaking a tie. |
| I. Pecuniary claims under £100,000 in value. | Original and final jurisdiction, award by majority vote. | | |
| II. Pecuniary claims over £100,000 in value. Also claims growing out of rights "under treaty or otherwise," but not territorial. | Original jurisdiction, which is also final if by unanimous vote. | Jurisdiction upon appeal, if A does not render unanimous award. Majority vote final. | |
| III. Territorial claims such as relate to servitudes, navigation, access, fisheries, boundaries, etc. | | | Original jurisdiction. Award final if by vote of five to one, or if by majority vote, and no appeal is made within three months. If protested, mediation to be tried before hostilities. |

mitted straightway to arbitration. Imagine the standing of a business house which made a practice of collecting its bills by legal process before their friendly presentation and adjustment through correspondence! Arbitration is sought after as a substitute for war, not as a substitute for diplomacy. It has been feared that the existence of a tribunal ready to settle international differences would greatly lessen the potency of the diplomatic method. Diplomats would feel less responsibility for, and take less interest in, a matter which, in all likelihood, was soon to be transferred to other hands for settlement.

Thus the amount of international litigation would largely increase. Thus the efficiency of processes which now arrange nine tenths of the differences between states, without causing a ripple of excitement, would be seriously weakened. Arbitration, like all other litigation, arouses hard feeling. It is infinitely better than war; but it is much inferior to diplomacy, because less flexible and with no capability for compromise or adjustment.

In some measure the arbitration treaty recognizes this, though not so fully as could be wished. In its first article, the contracting parties agree to submit to arbitration "all questions in difference between them

which they may fail to adjust by diplomatic negotiation." Here the presumption is expressed that diplomacy will have been tried. That is right and wise. But there is an underlying presumption that diplomacy will fail. That is a fault inherent in the arbitration principle. Possibly it might be minimized by excluding the first class of differences, the minor claims, which neither country would fight over in any case. Or where individual, rather than national, claims are being pressed, the cost of arbitration could be deducted from the amount recovered. Or a certain delay might be compulsory, before recourse was had to a treaty tribunal, during which the state departments must try to effect a settlement. Perhaps in some such way as this the too free use of the international tribunal could be checked, and the methods now effectively employed could be preserved.

It has often been urged that no nation can afford to tie its hands in advance by submitting to arbitration all possible questions, including those which involve its national policy, its national honor, its national life. To do so would be a surrender of national sovereignty in its highest expression, a waiver of that right of self-defense which is the first law of nations. This is fully recognized by the treaty. It specifies the classes of questions which shall be submitted. These

are: pecuniary claims; differences involving rights under treaty or international law; territorial claims. By inference, all other questions are held to be incapable of submission, those involving national policy among them. So that we may direct the search-light of the Monroe Doctrine at will upon this continent; we may declare British aggression upon Patagonia dangerous to our safety and free institutions, without the risk of being brought to book before a court of arbitration.

On the other hand, the treaty does require the submission of just those differences the like of which the two nations have already so often arbitrated. Fishery disputes, as at Halifax; pecuniary claims, as at Geneva; boundaries, as in the San Juan case—all such must be referred to the new tribunal, if not otherwise settled, and very properly. They are questions of law, or fact, or treaty interpretation, usually capable of this kind of settlement. A few cases perhaps remain where national policy and treaty obligations are so intermingled that they ought not to be, as they seem to be, included among the differences to be finally decided by Tribunal B. For example, under the Clayton-Bulwer treaty, the United States binds itself to abstain from exclusive control over an isthmian canal in Central America;

nevertheless the prevalent national belief is that such exclusive control is our prerogative and our policy. Here a question of policy, under the guise of a right under treaty, might be referred for final decision. For myself, I am strongly inclined to the opinion that the proper status of any canal across Central America will be found to be its neutralization guaranteed by the commercial powers. But its disposition is certainly a question of policy open to argument; and very likely the Senate may withdraw this particular case from the operation of the treaty.

Turn now to the third class of objections to any permanent arbitration agreement—those relating to the framing and working of its machinery. It is here that the treaty deserves most praise and confidence. It is an ingenious, and should prove a successful, attempt to substitute the judgment of a court for the self-pronounced judgment of a people. It does this, not by promising an award, but by furnishing a trial. All pecuniary claims are, it is true, to be finally disposed of by it. The same is true of differences growing out of rights whether under treaty or the general law of nations. But a majority of the serious cases which may arise, which are called territorial claims by the treaty, and include questions of access, navigation, fisheries, boundaries,—in fact,

most of those rights for which a nation would go to war,—must go to trial, but with no certainty of a final judgment.

Through this failure to insure a binding verdict, paradoxically enough, the treaty is strong where it seems to be weak. It is safe, because it does not attempt too much. It bids fair to be effective, because it does not promise efficiency. It is a hopeful attempt at arbitration, although, technically speaking, not arbitration at all; for the very essence of arbitration lies in the finality of its award. What it offers is a refuge from popular excitement—the chance of a settlement, the certainty of a breathing-spell. What it does *not* offer is a binding award on all the questions between its members, to fit like a strait-jacket upon the body politic and tempt it irresistibly sometimes to break the bonds. Notice the procedure in the third class of cases. If the award is unanimous or made by a vote of five to one, it is final. But if made by any less majority it may be protested, and is “of no validity.” The next step is a recourse to mediation, which is the offer of good advice, with no obligation to take it. Then diplomacy may try its hand again. Finally, the question may be put to the arbitrament of war.

In this chain of processes a final award is reached, if the matter in dispute is clear to

an overwhelming majority of the tribunal. But the certainty remains that if the question has elements of doubt in it, two out of the three judges who comprise each half of the court can and will prevent a verdict. For in matters essential yet uncertain they will retain their national bias and point of view. Nationality and human nature are stronger than the judicial temperament. It has always been so; it is even desirable that it should be so. We may safely conclude that the framers of the treaty relied upon this fact in inserting this provision, and did so to prevent the infinite risk of a breakdown of machinery, in case a beaten litigant refused to accept the award. They rested upon the presumption of peace which it contains, not upon the strength and completeness of its procedure.

Criticism there may be of this and that detail. No code of international law exists to guide the tribunals. The judges who are to form Tribunal C are already overburdened. The method of naming the umpires may prove clumsy or bad. Still, such objections as these are overshadowed and outbalanced by the strong probability that the plan would work. It would prevent war scares, because the popular mind, always ready to take fright or to take fire, would be conscious of various and lengthy pro-

cesses which must precede war; and the popular interest soon tires. It would tend to prevent war, because it insures a trial of most differences, gathers light upon them from several quarters, prevents action in hot blood, and presupposes peace. Being an experiment, to last for five years only unless proved satisfactory, it is a working basis upon which to build. It does not imperil the arbitration principle by attempting too much. It is a step—a considerable step—toward a better order of things.

When mountain-climbers reach ice they put on the rope, and, cutting step after step, slowly and carefully mount to their goal; they do not risk all by a hasty scramble up the incline.

Here are two nations, in speech, in laws, in blood, in institutions, in ideals, akin. Together they climb the slippery slopes of the Mount of Lasting Peace and Brotherhood. With this treaty they rope themselves together. The step-cutting has begun. The ascent is slow; but if it be made sure, who can venture to set a limit to their upward progress?

THE UNITED STATES AND THE
DECLARATION OF PARIS

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THE UNITED STATES AND THE DECLARATION OF PARIS

THERE is a possibility that the accession of the United States to the declaration of Paris is shortly to be urged upon the Secretary of State. In such event the reasons favoring this action may well be worthy of our study. The articles of this important international compact, made in 1856, at the close of the Crimean War, were as follows:

“1. Privateering is and remains abolished.
2. The neutral flag covers enemy's goods, with the exception of contraband of war.
3. Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag. 4. Blockades in order to be binding must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.”

This declaration was to be binding only as between the parties to it. Spain, Mexico,

and the United States are the only commercial states of importance which have thus far failed to give in their adhesion, the two former being restrained by the refusal of the latter. The action of the United States was thus explained: The policy of this country was against the maintenance of a large navy. To supplement that navy in the work of commerce-destroying and of enforcing the rules of naval war against neutral trade, the issue of letters of marque might be necessary; so that unless the declaration were so amended as to exempt all innocent private property, neutral or hostile, from capture, the accession of the United States was declared impolitic. This "Marcy amendment" was not carried, owing to the influence of Great Britain.

The question of accession again came up during the first year of the War of the Rebellion. Dropping this Marcy idea, Mr. Seward was willing to accede unconditionally. The obstacle came from France and particularly from Great Britain. For Mr. Seward was warned that the accession of his country could have no retroactive effect to "invalidate anything already done," could not be held, that is, to apply to the hostilities already broken out between North and South; with this limitation understood it would be accepted. Mr. Henry Adams, in

an interesting essay,¹ enlarges upon the duplicity of Lord Russell in considering and replying to this offer. But to my mind, for its failure, Mr. Seward was not wholly blameless. For, as always in the early years of the war, he was proceeding on the assumption that the United States could not, and that foreign powers must not, recognize the belligerency of the South. Now, in point of fact, the government of the North had itself recognized Southern belligerency, by refusing to punish the crews of Southern men-of-war as pirates in spite of the decision of the court (*Prize Causes*, 2 Black, 635), and by establishing a blockade of Southern ports, which is a war measure. Holland, France, and Spain, as well as Great Britain, had already made formal recognition of the belligerency of the Confederate States. President Davis had been asked to bind his country to observe the rules of the declaration, and had declined.

Under these circumstances, why was it not reasonable to impose as a condition, upon a convention of accession, the proviso that the said accession should be prospective merely and should not be held applicable to the struggle at hand? But such a proviso conflicted with that false and hampering theory that the North was not at war with a bellig-

¹ "Historical Essays," by Henry Adams (Scribner, 1891).

erent power, and the offer of accession was withdrawn. This was more than thirty years ago. Now, however, in a time of peace, with no ulterior motives possible, the question of accession is likely to be again brought forward, and can be argued on general grounds. The object of the present paper is to make very briefly a plea for such action.

As the article relating to paper blockades has been formally advocated by this country, it may be left out of consideration. The three other provisions of the declaration may be arranged in a balance-sheet, somewhat as follows :

| The United States in account with The Signatories of the Declaration of Paris. | |
|---|--|
| Dr. | Cr. |
| For adoption of rules that (1) Free ships make free goods. (2) Enemy ships do not infect the neutral goods on board. E. & O. E. | For renunciation of the right to commission privateers. |

The following propositions are laid down without argument as our premises :

1. The interests of the United States are, on the whole, on the side of neutral rather than of belligerent rights.

2. The two rules on the debtor side of the balance are already adopted by the policy of the United States.

3. If the United States should engage in war, the chances are largely that such war

would be with a power weaker than itself in its war navy and naval resources.

The history of the American carrying-trade during the Napoleonic wars is a striking illustration of the value of neutral privileges. Although our ships had no right to shelter enemy goods under their neutral flag; although the doctrine of occasional contraband enforced by Great Britain, sometimes softened into preëmption, greatly interfered with our chief article of export, provisions; although the restrictive decrees of each belligerent, culminating in the utterly unjust and unlawful paper blockades declared by both, at times threw our trade into confusion, nevertheless American tonnage increased thirty, sixty, even one hundred, thousand tons per year.

If the economists are correct, we are probably now approaching a time when our vanished foreign carrying-trade will revive. Cheaper production will enable our manufacturers to exchange commodities with foreign countries more freely. Cheaper ships, operating under less repressive shipping and port regulations, will reach out for their share of our own increased commerce and of the commerce of the world. What does such trade need in view of the chances of war between our friends? It needs, first, fixed and stable conditions; second, the

greatest freedom possible, the least possible interference from the exercise of belligerent rights. Now, very little argument is required to show that in these respects the neutral shipper is better off under the declaration than the neutral shipper without it. Suppose war between Great Britain and France. Dutch or Danish ships, under the declaration, could carry safely French goods not contraband nor bound to a blockaded port, while on a United States ship those same goods, being unprotected by the declaration, would be liable to capture. Under such circumstances French goods would seek other flags than ours. And, again, since France until the declaration condemned neutral goods sailing under an enemy's flag, and since the declaration binds its signatories only as relates to one another, every ton of American wheat, every bale of American cotton, borne on an English ship would be subject to capture by French cruisers. This state of things would be similarly true in the event of any war between our friends unless a prior treaty with them forbade. We have treaties which lay down the principle of "free ships, free goods," with Spain, Russia, Prussia, Italy, and Sweden alone of important commercial powers. Probably France alone would claim the right to condemn our goods for seeking carriage on her

enemy's ships. Under the principles stated it is clear that our neutral ships could not compete on even terms with other neutral ships for the carrying-trade. And if France were a belligerent our goods might be subject to great inconvenience and even danger. The rights of the declaration, then, are of vital importance.

Turn now to the credit side of the account, and estimate what we should be obliged to surrender as the equivalent for these benefits, the right to commission privateers. It is the clinging to this right which has hitherto stood in our way.

It is not a little curious that, while insisting upon the right to issue letters of marque to subjects of other countries, the United States forbids its own subjects, by statutes of 1797 and 1816, to take part in the equipment or manning of privateers to act against nations with which it is at peace. While retaining this demoralizing form of warfare, it denies to its citizens the right to share in its profits when other nations employ it. From this fact may fairly be drawn the inference that privateering is a trade of which this country in the abstract disapproves. More than this, the United States has negotiated eleven treaties which reciprocally contain the same prohibition.

The value of privateering is still further

narrowed when we consider what it accomplishes. As the distinction in build and equipment and armament between men-of-war and other ships grows more marked, the privateer grows less important in waging war. War in the sense of an exercise of force upon armed ships is not really the object of privateering. Its reason for being lies in its capacity for attacking an enemy's commerce, which, while primarily enriching the privateersman, incidentally benefits the state commissioning him. He may also, though less readily, be useful in enforcing the laws relating to the carrying of contraband and to blockade. But, to-day, war navies are themselves built for a twofold purpose—the heavy armored ships for fighting, the fast protected or unarmored cruisers with large coal-capacity for preying upon commerce and enforcing belligerent rights against the neutral. The rise of ships of this latter class, virtually doing a privateer's work, detracts from the necessity for his existence. His importance is lessened by still another consideration. The value of privateering should be estimated not only absolutely but relatively. It helps the weaker naval power relatively more than the stronger. Its abolition was the reason, for instance, which induced Great Britain, the strongest of all naval powers, to consent

to allow the neutral to carry her enemy's goods free under his flag. This surrender of a right consistently exercised by Great Britain since the time of the *Consolato del Mare* was a very great concession.

Granting the premise that the United States is more likely to be at war with a power weaker in naval resources than itself, than with one stronger, it follows that privateering, considered apart from any equivalent gained in return for its abolition, would be more valuable to other countries than to us. The safety of our own commerce is more important than the destruction of the commerce of such an enemy.

If these arguments are sound, the United States is in this position: A very valuable privilege, involving a freedom of neutral trade which would put it on the same footing with the most favored nations, is offered it in exchange for the abolition of privateering.

It disapproves of privateering in the abstract. It forbids its citizens to engage in it when neutral. It has not itself employed privateers for two thirds of a century. It has ships which can do a privateer's work better than a privateersman, and with fewer evil results. Privateering would, by the doctrine of chances, help our enemies more than ourselves. In itself considered, the

retention of the right to commission privateers is not valuable to the United States. When the equivalent gained by its abolition is kept in view, the argument for accession to the declaration of Paris is overwhelming.

The freedom from capture of all innocent private property at sea, even an enemy's, is the next step in the neutral program. Our accession to the declaration should help toward this. Our accession should be coupled with that of Spain and Mexico. A foreign war affecting American commerce may break out at any time and with scant warning. If our accession to the declaration is a proper step, it should be taken *now*.

[NOTE.—The fact that neither Spain nor the United States in the war now in progress has seen fit to employ privateers, that both have conformed in their usage to the rules of the declaration of Paris, may be mentioned as confirming the view here taken.]

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